TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~266~~ 39

HARVEY TERRY, JOSHUA GREEN, AND THOMAS GREEN, APPELLANTS,

vs.

EDWARD C. ANDERSON, JR., E. C. ANDERSON, JR., EXECUTOR OF GEO. W. ANDERSON, DECEASED; C. A. BAYNARD, ROBERT W. FLOURNOY, N. B. KNAPP, ANDREW LOW, JR., W. H. CUYLER, JOHN C. NICHOLL, WILLIAM ROBINSON, MARY TELFAIR, THOMAS H. HARDEN, AND H. W. MERCER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED JANUARY 13, 1875.

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1 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

At a stated term of the circuit court of the United States of America for the southern district of Georgia, held at the United States court-rooms in the city of Savannah, in and for the said district, on the ninth day of December, in the year of our Lord one thousand eight hundred and seventy-four—

Present, the honorable William B. Woods, U. S. judge for the 5th judicial circuit, and the honorable John Erskine, U. S. judge for the district of Georgia, presiding.

HARVEY TERRY ET AL., COMPLTS.,
vs.
EDWARD C. ANDERSON, JR., &C., ET AL., DEFTS. } In equity.

Be it remembered that heretofore, to wit, on the sixth day of April, in the year of our Lord one thousand eight hundred and seventy-four, came the said complainants, by their solicitor, D. T. Corbin, and filed their bill of complaint against the said defendants as follows:

2 *Bill of complaint.*

THE UNITED STATES OF AMERICA,
Southern District of Georgia:

Fifth circuit. In equity.

To the honorable the judges of the circuit court of the United States for the said district:

Harvey Terry, a citizen of the State of South Carolina, and Joshua Green and Thomas Green, citizens of the State of Mississippi, doing business under the firm-name and style of J. and T. Green, bring this their bill of complaint in behalf of themselves and of all other persons, creditors of the Planters' Bank of the State of Georgia, who stand in like condition with them, and who shall come in and contribute to the expenses of this suit against the following-named persons, citizens of the State of Georgia, to wit: Edward C. Anderson, jr., Edward C. Anderson, jr., as executor of the last will and testament of George W. Anderson, deceased; C. A. Baynard, Robert W. Flournoy, N. B. Knapp, Andrew Low, jr., W. H. Cuyler, John C. Nicholl, William Robinson, Mary Telfair, and Thomas H. Harden, and against H. W. Mercer, a citizen of the State of Maryland.

And thereupon your orators, complaining, say:

I. That the Planters' Bank of the State of Georgia was a corporation created by the laws of the State of Georgia on the 19th day of
3 December, A. D. 1810; that the charter of said corporation was amended by an act of the general assembly of said State, approved December 3, 1811, and was extended on the 23rd day of December, A. D. 1836, for twenty years, by the legislature of said State, and was again extended on the 5th day of December, A. D. 1859, until the 1st day of January, A. D. 1881, the last extension being granted by an act of the legislature of said State entitled "An act to extend the charter of the Planters' Bank of the State of Georgia and to continue the rights granted by existing acts to the said bank, and for other purposes therein named;" that by the said acts constituting the charter of the said bank the said bank was established in the city of Savannah, and

its capital stock was fixed at one million of dollars, divided into ten thousand shares of one hundred dollars each.

The said charter provided, among other things, that the said bank should not owe, at any time, more than three times its capital stock; that the bills which the said bank should issue should be signed by the president and countersigned by the cashier, and that the persons and property of the stockholders, for the time being, in said Planters' Bank shall be pledged and bound in proportion to the amount of the shares that each individual or company may hold in said bank for the ultimate redemption of the bills or notes issued by or from said bank during the time he, she, or they may hold such stock, in the same manner as
4 in ordinary commercial cases or in simple cases of debt.

II. That the said Planters' Bank of the State of Georgia, from time to time, after its incorporation, and prior to the 24th day of May, A. D. 1866, issued a large amount of its bills or notes, commonly called bank-notes, payable to bearer and signed by its president and countersigned by its cashier, which were intended to and did circulate as money, and that a large amount of such bills and notes came into the possession of your orators, as hereinafter stated. That the said bills were received by your orators in the due course of trade for value.

III. And your orators show, on information and belief, that the said Planters' Bank of the State of Georgia, on the twentieth day of February, A. D. 1865, failed to pay its said bills or notes in lawful money of the United States, and continued to fail and refuse payment of said bills and notes in lawful money of the United States until the twenty-fourth day of May, 1866.

That on said last-mentioned day, a meeting of the stockholders of said corporation was convened by notice given in pursuance of the provisions of its charter, at the banking-house of said corporation, in the city of Savannah, and, a majority of the stockholders being then and there present or represented, certain resolutions were adopted instructing the board of directors of said corporation to make and execute a deed of assignment conveying to G. W. Anderson and H. W.
5 Mercer the assets of the said bank for the purpose of equal distribution among the creditors and bill-holders according to law, and to surrender to the governor of the said State the charter of the said bank at such time as they might deem expedient, it being the opinion of said stockholders, as expressed in said resolution, that the said corporation was insolvent and unable to pay its debts.

That in pursuance of such authority and the direction of the board of directors of said bank, a deed of assignment, a copy of which is hereto annexed, and marked "Exhibit B," was duly and legally made and executed by the president and cashier of said corporation, on the ninth day of July, A. D. 1866, by which the said corporation conveyed to the said G. W. Anderson and H. W. Mercer, as assignees, the property of said corporation, to wit: all the property of said corporation, both real and personal, rights, credits, and effects, choses in action, debts, demands, and interests of every description, owned by said corporation, whether in possession or in action, for the purposes aforesaid; and the said G. W. Anderson and H. W. Mercer duly accepted the said trust conferred on them by said deed of assignment, entered upon their duties and continued in discharge thereof from said ninth day of July, A. D. 1866, until they were finally discharged on the thirteenth day of June, 1873, from their trusts under said assignment.

IV. And your orators further show that soon after the said G.
6 W. Anderson and H. W. Mercer had entered upon the execution

of their duties as assignees as aforesaid, they caused a notice of their appointment to be published in the following form, to wit:

"ASSIGNEES' NOTICE.

"The undersigned having been appointed assignees of the Planters' Bank of the State of Georgia, are prepared to enter upon their duties, and all bill-holders and other persons having claims against said bank are requested to present the same for liquidation, and all parties indebted to the bank are requested to make immediate payment. Bill-holders will lose their priority if the bills are not presented within six months.

"GEORGE W. ANDERSON,
"A. W. MERCER,
"*Assignees.*"

The said notice, as your orators are informed and believe, was published for three months in the Savannah Daily Morning News, from July 10th to October 10th, 1866.

V. That in obedience to said notice your orators presented to and lodged with the said assignees, for liquidation, certain of the bank-bills or bank-notes issued by the said bank as follows, to wit:

Your orator, Harvey Terry, on the 24th day of December, 1869, duly presented to and lodged with said assignees, bank-bills of said bank to the amount of five thousand six hundred and five (5,605) dollars.

7 Your orators, Joshua and Thomas Green, on the day of December, 1869, duly presented and lodged with said assignees bank-bills of said bank to the amount of five thousand seven hundred and ninety-one (5,791) dollars.

For the bills thus presented and lodged with said assignees for liquidation said assignees gave your several orators receipts, which receipts were taken and accepted by your orators, and the same are now held by them.

That upon the said bills of your orators, so as aforesaid presented to and lodged with said assignees for liquidation, your orators were paid by the said assignees a dividend of twenty (20) per cent. out of the assets of said bank in their hands, before the first day of January, 1870.

VI. And your orators further show that they did not know, and had no means of knowing, during the period which intervened between the times when they presented their bills to the said assignees for liquidation and the first day of January, A. D. 1870, the amount of the assets, or the extent and nature of the liabilities of said bank; and your orators had hoped that the assets of said bank would be sufficient to pay their said bills in full. And your orators, on information and belief, show that, at the time of the failure of the said bank, the full amount of the capital stock of said bank had not been paid in by the stockholders; and that the holders of a very large majority of the

8 stock of said bank had paid in, on account thereof, only eighty dollars on each share held by them respectively, leaving a balance of twenty dollars on each share held by such stockholders unpaid.

And your orators allege that the right to sue for and recover whatever unpaid balances might be due on the several shares of capital stock in said bank inured to the said assignees by the provisions of the aforesaid deed of assignment; but your orators are informed and believe

that the said assignees have not exercised the said right, and said balances have never been collected.

VII. That after the said assignees had paid to your orators the amounts due to them respectively, as their dividend of twenty per cent. on the said bank-notes of the said Planters' Bank of the State of Georgia, which your orators had presented to and lodged with said assignees for liquidation, the said assignees caused to be filed in the superior court of Chatham County, in the State of Georgia, a bill in equity, entitled, on the records of said court, George W. Anderson and Hugh W. Mercer, assignees, etc., complainants, against T. J. McNish and others, defendants; to which bill the said assignees were complainants, and your orators, together with a very great number of other creditors, to wit, five hundred and sixty, or thereabouts, of said bank, holders of its bills, depositors and others, were defendants. The said bill,
9 among other things, prayed the judgment of the said superior court upon the questions therein raised, and also prayed the instruction of the said court to the said assignees as to the proper methods of paying out the moneys in their hands, as such assignees, to the several claims against said bank, and of finally distributing the same, and winding up of the affairs of said bank, in pursuance of the terms and provisions contained in the aforesaid deed of assignment.

The said superior court of Chatham County, on the 14th day of July, 1871, proceeded to adjudicate upon the rights of the several parties to the said bill, and said court found and decreed that there was due to your orators, respectively, by the said Planters' Bank of the State of Georgia, as follows:

1. On bills or notes of said bank held by them, respectively, the sums set opposite their respective names, less twenty per cent. previously paid to them by said assignees, as hereinbefore set forth, to wit, Harvey Terry, five thousand six hundred and five (5,605) dollars; J. and T. Green, five thousand seven hundred and ninety-one (5,791) dollars.

2d. To your orator, Harvey Terry, the sum of one thousand one hundred and seventeen (1,117) dollars, on bills or notes issued by the said Planters' Bank of the State of Georgia, on which no payment had been made.

10 The said court further decreed, among other things, that upon said last-mentioned debt of one thousand one hundred and seventeen (1,117) dollars due to your orator, Harvey Terry, the said assignees should pay the sum of twenty per cent. to make the said debt stand on an equality with the debt due from said bank to your orators on account of the said notes held by them, respectively, and on which they had received the said payment of twenty per cent.

And the said court further decreed that the said assignees should pay the balance of the assets of said bank in their hands equally, pro rata, to all the creditors named in said decree, your orators being named among said creditors, in proportion to their respective dues, as declared in said decree.

That thereafter the said assignees, in obedience to the terms of said decree, did make a payment to your orator, Harvey Terry, of twenty per cent. on account of said debt of one thousand one hundred and seventeen (1,117) dollars, and subsequently made two further payments on account of the debts found due your orators, respectively, by said bank on its bills or notes, one of which payments amounted to nine and five-eighths ($9\frac{5}{8}$) per cent., and the other to one-half of one ($\frac{1}{2}$) per cent. of the full amount of the principal of said debts. The said payments, together with the first payment of twenty per cent., amounted in all to

thirty and one-eighth (30⅛) per cent., leaving a balance still owing
11 and unpaid of sixty-nine and seven-eighths (69⅞) per cent. upon the full amount of said several principal sums so as aforesaid adjudged due to your orators, together with interest on such several sums from the 14th day of July, 1871, the date on which the decree of said superior court of Chatham County was rendered.

VIII. And your orators further show, on information and belief, that the said George W. Anderson and Hugh W. Mercer were finally and forever discharged from their duties as assignees as aforesaid on the thirtieth day of June, 1873, having finally accounted to the said superior court of Chatham County for all assets of said bank which had come into their hands, and on their showing to said court that no property of said bank remained in their hands for distribution.

IX. That your orator, Harvey Terry, is now the lawful owner and holder of bank bills or notes issued by the said corporation, signed by the president and countersigned by the cashier of the same, the face-value of which amounts to fourteen hundred and sixty-four (1,464) dollars. Said notes or bills are of different dates and denominations, but all of them were duly issued, as your said orator believes, by the said bank before the twentieth day of February, A. D. 1865.

The said bills are not included in the amount for which judg-
12 ment was given for your orator in the aforesaid superior court of Chatham County, in the said case of George W. Anderson and Hugh W. Mercer, complainants, against T. J. McNish and others, defendants.

That the said bills of your orator, Harvey Terry, were received by him for value in due course of trade, on various dates, between the day of , 18 , and the day of , 18 .

X. And your orators further show that on the eighteenth day of March, A. D. 1869, the general assembly of the State of Georgia, by a resolution duly passed, accepted the surrender of the charter of the said corporation, and thereupon the said corporation, as they are advised, ceased to have an existence as a corporation, except for the purpose of finally settling and winding up its concerns and claims, as provided by rule No. 15 of section eighth of the aforesaid act of the general assembly of said State of Georgia, approved December third, A. D. 1811, amending the said act of December nineteenth, A. D. 1810, incorporating the said Planters' Bank of the State of Georgia.

XI. That on the twenty-fifth day of June, A. D. 1873, your orator, Harvey Terry, caused the said last-mentioned bills, amounting to the sum of one thousand four hundred and sixty-four (1,464) dollars, which had been issued by said bank, to be presented to
13 Thomas H. Harden, business agent of said bank, and of the said assignees, for payment and redemption, but payment and redemption thereof was refused.

XII. And your orators further show, on information and belief, that at the time of failure of said bank there were outstanding bills and notes issued by said bank, and for the payment of which said bank and the holders of shares of stock of said bank were liable, amounting to one million four hundred and sixty thousand one hundred and twelve dollars, ($1,460,112.) Of this amount two hundred and seven thousand four hundred and forty-eight dollars ($207,448) were redeemed before the said bank executed the aforesaid deed of assignment of July 9, 1866, to the said George W. Anderson and Hugh W. Mercer, leaving a balance of bills and notes outstanding at the time of said assignment

of one million one hundred and fifty-five thousand and thirty-eight dollars, ($1,155,038.)

XIII. And your orators further show that they respectively received the said several bank-bills of said bank, owned by them on the faith of the charter of said bank, which charter, as they allege, constituted the contract between your orators, as bill-holders, and the said defendants, as stockholders and corporators; that by the terms of said third section of said act of December 15, 1859, and also by the terms of
14 the third section of said act of December 23d, 1836, extending the charter of said Planters' Bank, the said defendants are pledged and bound in proportion to the amount of the shares that each of them may respectively have owned on the day of the failure of said bank, to wit, the 20th day of February, A. D. 1865, to pay to your orators whatever balance may be found due them, in order to redeem, in full, the said bills or notes owned by your orator, Harvey Terry, and in order to satisfy the said judgments so as aforesaid obtained by your orators on the said bills or notes, on account of which they have received payment as aforesaid, to the amount of thirty and one-eighth per cent.

XIV. And your orators further show, on information and belief, that the following persons, among others, were holders of stock or shares in said Planters' Bank of the State of Georgia, on the 20th day of February, 1865, the date of failure of said bank, at which time all the bills issued by said bank and owned by your orators were outstanding and unpaid, and that the said persons severally held the number of shares of the stock of said bank set opposite their respective names, and on account of which they made the payments hereinafter stated, to wit:

15

	Shares.	Amount paid on shares.
Edward C. Anderson, jr., owned forty-five shares, on which he had paid three thousand six hundred dollars, ($3,600)	45	$3,600
George W. Anderson, since deceased, of whose estate Edward C. Anderson, jr., is executor, in his own right owned eight hundred and twelve (812) shares, on which there was paid the sum of sixty-eight thousand and fifty-five ($68,055) dollars	812	68,055
And as trustee for some person or persons to your orators unknown, he owned and held three hundred shares, (300,) on which there was paid the sum of twenty-four thousand ($24,000) dollars	300	24,000
As trustee for M. A. D. Sorrel, he owned and held eighty-one (81) shares, on which there was paid the sum of six thousand six hundred and eighty ($6,680) dollars	81	6,680
As trustee for S. A. Gordon, he owned and held thirty-four (34) shares, on which there was paid two thousand seven hundred and twenty ($2,720) dollars	34	2,720
As trustee for E. Nicholl, he owned and held ninety (90) shares, on which there was paid seven thousand two hundred and twenty ($7,220) dollars	90	7,220
As trustee for M. S. Mercer, he owned and held ninety (90) shares, on which there was paid seven thousand two hundred and twenty ($7,220) dollars	90	7,220
16 C. A. Baynard owned twenty-five (25) shares, on which there was paid the sum of two thousand ($2,000) dollars	25	$2,000

	Robert W. Flournoy owned one hundred and one-half (100½) shares, on which there was paid the sum of nine thousand ($9,000) dollars	100½	9,000
	N. B. Knapp owned thirty-two (32) shares, on which there was paid the sum of two thousand five hundred and sixty ($2,560) dollars	32	2,560
	Andrud Low, jr., owned fifty (50) shares, on which there was paid the sum of four thousand ($4,000) dollars.	50	4,000
	W. H. Cuyler owned twenty (20) shares, on which there was paid the sum of sixteen hundred (1,600) dollars.	20	1,600
	He also owned and held, in connection with George W. Anderson, in trust for E. Waters, twenty-six (26) shares, on which there was paid the sum of two thousand and eighty ($2,080) dollars	26	2,080
	Hugh W. Mercer owned thirty-one (31) shares, on which there was paid the sum of two thousand four hundred and eighty ($2,480) dollars	31	2,480
17	John C. Nicholl owned thirty-seven (37) shares, on which there was paid the sum of three thousand and eighty ($3,080) dollars	37	3,080
	William Robinson owned three hundred and forty (340) shares, on which there was paid the sum of twenty-seven thousand two hundred ($27,200) dollars	340	27,200

XV. And your orators further show that after the payment to them by the said assignees of the said dividend of thirty and one-eighth per cent. upon the bank-bills of said bank, on which judgment had been obtained by them as hereinbefore alleged, and which bills had been lodged with said assignees for the purpose of receiving said dividends, your orator, Harvey Terry, applied to said Thomas H. Harden, agent of the said assignees, for a return of the said bills, but the said bills were not returned, and your orator was informed by the said Thomas H. Harden that the entire amount of bank-bills that had been lodged with said assignees in obedience to the aforesaid notice, and which had been presented to them under the said decree of superior court of Chatham County, and upon which said assignees had paid the said dividend of thirty and one-eighth per cent. had been cancelled, and had been sold as waste-paper.

18 Your orators are therefore unable to furnish any schedule of said bills, or produce them before this court as evidence in this suit.

XVI. And your orators further show that they are informed and believe that at the time of the failure of said bank, the ten thousand (10,000) shares into which the stock of said bank is divided, were held and owned by a great number of persons, between two and three hundred, as they are informed and believe, but the exact number they do not know, and have not been able to discover; that the books of the said bank have been inaccessible to them, and they could not, therefore, from them learn the number or names of such stockholders; that some of the stockholders, as they have ascertained by diligent inquiry, reside without the limits of the State of Georgia, and out of the jurisdiction of this court; some are insolvent, and the names and places of residence of others are totally unknown to them.

That the defendants herein, except Thomas H. Harden, are the owners or holders, or the representatives of owners and holders, of about one-fourth of all the shares of the capital stock of the said bank; that

their interest in this suit is the same as the interest of all other stockholders therein; that all the legal questions involving the liability of stockholders of said bank for the unpaid balance due on their stock subscription and the ultimate redemption of the bills and notes issued by it can be fully determined and adjudicated in this suit; that
19 to bring all the holders of shares of the capital stock of said bank before the court in the first instance, would cause manifest inconvenience and oppressive delays to your orators, and they, therefore, pray that these defendants be deemed as the representatives of the interests of all the stockholders of said bank, and that this honorable court will dispense with the making at this time of the remaining stockholders (other than those hereby made parties to this suit) parties to this suit; and that if hereafter any of such other stockholders should be ascertained who would be proper defendants, they pray that they may have leave with apt words to charge them as such, and may have the necessary process of this court to bring them before it as parties defendant.

To the end, therefore, that defendants may if they can show why your orators should not have the relief hereby prayed, and upon their several and respective corporal oaths and according to the best and utmost of their several and respective knowledge, information, and belief, full, true, direct, and perfect answer made to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer, that is to say:

1st. Whether the said Planters' Bank of the State of Georgia did not issue the said bills or notes enumerated in Exhibit A, annexed to this bill of complaint?

20 2nd. Whether the Planters' Bank of the State of Georgia did not refuse to pay the bills or notes issued by it, which are referred to in said Exhibit A as being the property of your orator, Harvey Terry, and as having been protested for non-payment?

3rd. Whether the Planters' Bank of the State of Georgia did not, on the 20th day of February, 1865, and continuously thereafter, fail to pay its bills of credit and to redeem them in lawful money of the United States?

4th. Whether the Planters' Bank of the State of Georgia was not, on the 20th day of February, 1865, indebted to an amount far in excess of its assets?

5th. Whether a majority of the stockholders of the said Planters' Bank of the State of Georgia did not hold a meeting at the banking-house of said corporation in the city of Savannah on the 24th day of May, 1866, and whether, at said meeting, the stockholders did not adopt the resolutions referred to in section III of this bill of complaint?

6th. Whether George W. Anderson, as president, and Hugh W. Mercer, as cashier of said bank, did not, pursuant to authority of the stockholders expressed in the resolutions referred to in section III of this bill of complaint, and by the direction of the board of directors of said bank, make and execute the deed of assignment, a copy of which
21 is hereto annexed and marked "Exhibit B," to George W. Anderson and Hugh W. Mercer, as assignees of said corporation?

7th. Whether the said George W. Anderson and Hugh W. Mercer did not accept the trust conferred on them by said assignment, and did not enter upon their duties as assignees thereunder on the 9th day of July, 1866, and did not continue to act as such assignees until their final discharge, by order of court, on the 30th day of June, 1873?

8th. Whether the said George W. Anderson and Hugh W. Mercer did not cause to be published the notice of their appointment and calling in

claimants against said Planters' Bank of the State of Georgia, as alleged in section IV of this bill of complaint?

9th. Whether these complainants did not present to the said assignees, and lodge with them for liquidation, the bank-bills and notes issued by said bank, as alleged in section V of said bill of complaint?

10th. How much has been paid to the said Planters' Bank of the State of Georgia before the 24th day of May, 1866, on each share of the capital stock of said bank, owned or held by the defendant, or by the person of whose estate defendant is executor, administrator, legatee, or representative, and whether any further payment on account of said stock has been made since said last-mentioned date? If such further payment has been made, state the amount thereof, to whom, and for what reason made?

22 11th. Whether the said assignee', George W. Anderson and Hugh W. Mercer, did not file in the superior court of Chatham County, in the State of Georgia, on the 2d day of April, A. D. 1870, a bill in equity, as alleged in section VII of this bill of complaint, to which these complainants were parties defendant?

12th. Whether the said court did not, upon the hearing of the bill referred to in the last preceding interrogatory, under a decree by which it adjudged that the said Planters' Bank of the State of Georgia was indebted to these complainants in the following sums, to wit: To Harvey Terry, in the sum of six thousand seven hundred and twenty-two (6,722) dollars; to J. & T. Green, in the sum of five thousand seven hundred and ninety-one (5,791) dollars?

13th. Whether there was paid to these complainants by the said assignees, upon and on account of the said several judgments rendered in their favor, more or less than the amount of thirty and one-eighths (30⅛) per cent. of the face-value of the said bills owned by them respectively, and how much was paid?

14th. Whether the said George W. Anderson and Hugh W. Mercer, as assignees, were not discharged by the said superior court of Chatham County on the thirtieth day of June, 1873, and whether they had not, at that time, paid out and distributed all the assets of said bank which had come into their hands as assignees?

23 15th. Whether the said Thomas H. Harden was the business agent of the said George W. Anderson and Hugh W. Mercer, and whether said Harden or the said assignees ever returned, or caused to be returned, to these complainants, or to either of them, the bank-bills issued by said Planters' Bank which had been presented to and lodged with them by these complainants respectively for liquidation, and what disposition was finally made by said assignees of said bank-bills?

16th. Whether the said George W. Anderson and Hugh W. Mercer, as assignees, sued for and collected any sum or sums of money on account of unpaid subscriptions to the capital stock of said bank? If so, state the names of stockholders sued and the amount collected from each of said stockholders.

17th. Whether the charter of said bank was not surrendered to the State of Georgia, and whether such surrender was not accepted and (?) alleged in the tenth section of this bill of complaint?

18th. Whether the defendantdid not hold or own, on the 20th day of February, 1865, shares of the c pital stock of the said Planters' Bank of the State of Georgia? If so, how many did the defendant hold or own, when and from whom were they acquired, and were any of such shares, and, if any, how many, sold, transferred, or otherwise dis-

posed of after the said twentieth day of February, 1865, and before the twenty-fourth day of May, 1866?

19th. If the defendant sold, transferred, or otherwise disposed of any shares of stock in said Planters' Bank after the twentieth day of February, 1865, to whom were they sold or transferred, or how were they disposed of?

20th. Whether the defendant held on the 20th day of February, 1865, or between said date and the 24th day of May, 1866, as a trustee, or guardian, or in any other fiduciary capacity or character, or as a pledge, a share or shares; and, if so, how many, in the said Planters' Bank of the State of Georgia?

21st. If the defendant held, on the 25th day of February, 1865, or at any time thereafter, shares of said bank in a fiduciary character, for whose benefit they were held, stating names and present places of residence of such beneficiaries or cestuis que trust, and whether or not they are of full age?

22nd. Whether the person for whose estate the defendant is executor or administrator did not, on the twentieth day of February, 1865, or between said day and the 24th day of May, 1866, hold in his own right, and also as trustee, shares of stock in the said Planters' Bank of the State of Georgia; and, if so, how many, and in what capacity, and what disposition, if any, was made of the same during the life-time of such owner? Give name of person, if known, to whom the shares were sold or otherwise transferred.

23rd. Whether the estate of the person for whom the defendant is executor or administrator has been fully administered or distributed? If so, give the names of the several heirs or legatees, and state which are of full age, and the amount received by each as his portion of the estate.

And further, that the said defendants, stockholders, and legal representatives of stockholders of the said Planters' Bank of the State of Georgia be decreed to pay unto your orators such sums upon each share of stock owned and held by them respectively as shall make up the full amount of one hundred dollars, (the par value of such share of stock,) and such further sums respectively as may be found due to your orators in order to pay their just and legal demands upon the judgments which they have severally obtained on the bills issued by said bank, and upon which a partial payment of thirty and one-eighth per cent. has been already made out of the assets of said bank, and also upon such bills as are held by your orator Harvey Terry, upon which no payment has been made, and which were not included in the amount for which judgment was given in his favor by the said superior court of Chatham County, in the said cause, entitled George W. Anderson and Hugh W. Mercer, assignees, complainants, against T. J. McNish et al., defendants.

And that your orators may have such further and other relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

May it please your honors to grant unto your orators your writ of subpœna, to be directed to the said Edward C. Anderson, jr., Edward C. Anderson, jr., as executor, C. A. Baynard, Robert W. Flournoy, N. B. Knapp, Andrew Low, jr., W. H. Cuyler, John C. Nicholl, William Robinson, Mary Telfair, Thomas H. Harden, and Hugh W. Mercer, commanding them, on a certain day, and under a certain penalty to be therein named, to be and appear before your honors, in this honorable court, then and there true, direct, and perfect answer make to all and

singular the premises, and to abide and perform such further order and decree in the premises as to your honors shall seem meet.

And your orators will ever pray, &c.

D. T. CORBIN,
Complainants' Solicitor.

NOTE.—The defendant Edward C. Anderson, jr., is required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 16, 17, 18, 19, 20, 21, 22, and 23.

The defendants C. A. Baynard, Robert W. Flournoy, N. B. Knapp, Andrew Low, jr., W. H. Cuyler, John C. Nicholl, William Robinson, and Mary Telfair, are required, respectively, to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 17, 18, 19, 20, and 21.

The defendant Hugh W. Mercer is required to answer the interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21.

27 The defendant Thomas H. Harden is required to answer the interrogatories numbered 2, 9, 13, and 15.

D. T. CORBIN,
Complainants' Solicitor.

UNITED STATES OF AMERICA,
South Carolina District, ss:

Personally appeared before me Harvey Terry, one of the complainants in the above-entitled cause, who, on oath, says that the foregoing bill of complaint is true of his own knowledge, except as to the matters therein stated on information and belief; and as to those matters, he believes to be true.

HARVEY TERRY.

Sworn to before me this 31st day of March, 1874.
[SEAL.]

J. E. HAYGOOD,
C. C. C. U. S., Dist. of S. C.

EXHIBIT A.

Schedule of bank-notes held by Harvey Terry, issued by the Planters' Bank of the State of Georgia.

Thirty-one (31) notes of one dollar each, in form as follows:

No. 583.

The Planters' Bank of the State of Georgia will pay to the bearer one dollar on demand.

Savannah, January 1st, 1856.

H. W. MERCER, *Cashier.*

GEORGE W. ANDERSON,
President.

28 The other thirty (30) notes of this denomination are in like form, and were issued at various dates between January, 1855, and January 4, 1861 ..... $31 00

Forty-nine (49) notes of two dollars each, in form as follows:

No. 584.

The Planters' Bank of the State of Georgia will pay two dollars to the bearer on demand.
Savannah, , 1855.

H. W. MERCER, *Cashier.*

GEO. W. ANDERSON,
President.

The other forty-eight (48) notes of this denomination are in like form, and were issued at various dates between the day of , 1853, and the 7th day of January, 1861. 98 00

Twenty-three (23) notes of five dollars each in form as follows:

No. 53.

The Planters' Bank of the State of Georgia will pay five dollars to , or bearer, on demand.
Savannah, January 1, 1856.

H. W. MERCER, *Cashier.*

GEORGE W. ANDERSON,
President.

Other twenty-two (22) notes of this denomination are in like form, and were issued at various dates between August 2d, 1852, and January 2, 1860..... 115 00

Thirty-four (34) notes of ten dollars each, in form as follows:

29

No. 444.

The Planters' Bank of the State of Georgia will pay to , or bearer, ten dollars on demand.
Savannah, January 4, 1856.

H. W. MERCER, *Cashier.*

GEO. W. ANDERSON,
President.

The other thirty-three (33) notes of this denomination are in like form, and were issued at various dates between November 1, 1834, and January 2, 1860..... 340 00

Thirty-four (34) notes of twenty dollars each, in form as follows:

No. 69.

The Planters' Bank of the State of Georgia will pay to , or bearer, twenty dollars on demand.
Savannah, January 1, 1851.

H. W. MERCER, *Cashier.*

GEO. W. ANDERSON,
President.

The other thirty-three (33) notes of this denomination are in like form, and were issued at various dates between January 1, 1847, and January 1, 1853..... 680 00

Two (20) notes of fifty dollars each, in form as follows:

No. 688.

The Planters' Bank of the State of Georgia will pay fifty dollars on demand to , or bearer.
January 1, 1851.

H. W. MERCER, *Cashier.*

GEO. W. ANDERSON,
President.

30 The other notes of this denomination is in like form, and was issued January, 1853, and is numbered 389. 100 00

One (1) note of one hundred dollars, in form as follows:

SAVANNAH, *January* 1, 1853.

No. 555.

The Planters' Bank of the State of Georgia will pay one hundred dollars to N. Nungezer, or bearer, on demand..... 100 00
H. W. MERCER, *Cashier.*
GEO. W. ANDERSON, *President.*

Total..... 1,464 00

EXHIBIT B.

STATE OF GEORGIA, *Chatham County:*

An indenture made and entered into this ninth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the Planters' Bank, of the State of Georgia, a body-corporate and duly incorporated under the statutes of Georgia, of the first part, and George W. Anderson and Hugh W. Mercer, of the city of Savannah, county and State aforesaid, of the second part.

31 Whereas the said party hereto of the first part, by reason of losses arising from circumstances incident upon the late war, is unable to pay its just and legal debts;

And whereas, at a meeting of the stockholders of said corporation, held in the city of Savannah on the twenty-fourth day of May, 1866, it was, among other things—

Resolved, That the board of directors of the Planters' Bank of the State of Georgia are hereby instructed to make and execute a deed of assignment conveying to G. W. Anderson and H. W. Mercer the assets of the bank for the purpose of equal distribution among the creditors and bill-holders according to law, and to surrender to his excellency the governor of the State of Georgia the charter of said corporation at such time as they may deem expedient;

And whereas on the ninth day of July, and subsequently to the passage of the aforesaid resolution by the stockholders of said corporation, at a meeting of the said board of directors of the said corporation, it was, among other things—

Resolved, That the president be, and he is hereby, directed to make and execute an assignment of all the property, estate, credits, and assets of the Planters' Bank, of the State of Georgia, to George W. Anderson and Hugh W. Mercer, of Savannah, for the use and benefit *and benefit* of the creditors of said incorporation, and to affix to said
32 assignment the common seal of said incorporation; and that the said president be further directed to make the surrender of the charter of said incorporation in the terms of the statute in such case made and provided:

Now, this indenture witnesseth that the said party of the first part, for and in consideration of the premises and the sum of one dollar to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, confirmed, assigned, and transferred, and by these presents does grant, bargain, sell, alien, remise, release, confirm, assign, and transfer unto the said George W. Anderson and Hugh W. Mercer, and to their heirs and assigns, all the lands, tenements, and hereditaments, goods, chattels, merchandise, debts, choses in action, sum and sums of money due, owing, or belonging to said party of the first part, and all securities, bonds taken and obtained for the same, and all the estate, right, title, interest, property, and claim of the said party of the first part in and to the same according to a schedule thereof hereto annexed, marked "A."

To have and to hold the same with the appurtenances unto the said George W. Anderson and Hugh W. Mercer, and to their heirs, executors, administrators, and assigns, upon the conditions and trusts, nevertheless, that the said George W. Anderson and Hugh W. Mercer shall forthwith take possession and seizure of the premises, and within
33 such convenient time as to them shall seem meet by public or private sale, as they may deem best, for the best prices that can be procured, shall convert all and singular the premises into money, and as soon as possible collect all and singular the debts and sum and sums aforesaid, and after deducting the costs and charges of these trusts shall pay and apply the moneys arising therefrom in manner following, that is to say, they shall pay all moneys received by them to the creditors of the said party of the first part, ratably and in equal proportions according to their several and respective priorities. And the said party of the first part, in furtherance of the premises, doth hereby make, constitute, and appoint the said George W. Anderson and Hugh W. Mercer its true and lawful attorneys, irrevocable, in their name or otherwise, and for the trusts aforesaid, to ask, demand, recover, and receive of and from all and every person and persons, all and singular the property and estate, goods, chattels, wares, merchandize, debts, choses in action, sum and sums of money, and demands due and owing or belonging to said party of the first part, and, upon all receipts and deliveries in the premises, due acquittances and discharges in their name or otherwise to make, execute, and acknowledge, and in default of delivery or payment in the premises, to sue, prosecute, and implead for the same, as they may see fit, and to compound and agree for all or any part thereof,
34 and upon such composition or other agreement to make due acquittances and releases, and also for all or any of the purposes aforesaid to constitute one or more attorneys under them.

And the said George W. Anderson and Hugh W. Mercer hereby covenant for themselves and their heirs, executors, and administrators that they will keep a just and true account of all moneys received by them by reason of the premises, together with the time when and the persons from whom the same shall be received, and that they will well and truly

pay over and distribute the same according to the trusts before mentioned; and further that they will faithfully and justly conduct themselves according to their best skill, power, and ability in the execution of the trusts reposed in them, in all respects whatsoever, and that they will, from time to time, and whenever called upon by said party of the first part as its authorized agent, render and give a full, fair, and complete statement of all their actings in the premises.

In witness whereof the president of the said Planters' Bank of the State of Georgia has hereunto set his hand and affixed the common seal of said corporation, and the said George W. Anderson and Hugh W. Mercer have hereunto set their hands and seals the day and year hereinbefore written.

[SEAL OF THE BANK.] GEORGE W. ANDERSON,
President Planters' Bank, State of Georgia.

35 Signed, sealed, and delivered in the presence of—
THOMAS H. HARDEN.
WALTER S. CHISHOLM,
Notary Public, Chatham County, Georgia.

Attest:
H. W. MERCER, *Cashier Planters' Bank.*
GEORGE W. ANDERSON.
W. H. MERCER.

(Endorsement to foregoing bill:) U. S. circuit court, southern district of Georgia. In equity. Harvey Terry, Joshua Green, et al., complts., vs. Edward C. Anderson, jr., E. C. Anderson, jr., exor., &c., et al., defendants. Bill of complaint. Filed this 6th day of April, 1874. Jas. McPherson, clerk. D. T. Corbin, complts.' solicitor. Demurrer sustained and bill dismissed, Dec. 9, 1874. Leave to appeal Dec. 9, 1874.

36 *Subpœna.*

UNITED STATES OF AMERICA,
Southern District of Georgia.

HARVEY TERRY, JOSHUA GREEN, AND THOMAS Green, complainants, and EDWARD C. ANDERSON, JR., EDWARD C. Anderson, jr., executor, &c., et al., defendants. } In equity.

The President of the United States of America to Edward C. Anderson, junior, Edward C. Anderson, junior, executor, &c., of George W. Anderson, decd.; C. A. Baynard, Robert W. Flournoy, N. B. Knapp, Andrew Low, junior, W. H. Cuyler, John C. Nicholl, William Robinson, Mary Telfair, Thomas H. Harden, and H. W. Mercer, greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you, and every of you, are hereby commanded and strictly enjoined that, laying all other matters aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Savannah, at rules to be had on the first Monday in May next,
37 to answer to those things which shall then and there be objected to you in a bill of complaint filed by the said complainants, and

to do further and receive what the said court shall have considered in that behalf; and this you may in no wise omit under penalty of five hundred dollars. And have here this writ.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this sixth day of April, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JAS. McPHERSON, *Clerk.*

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated, in the clerk's office, on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken pro confesso.

D. T. CORBIN,
Solicitor for Complainants.

(Endorsement:) In the circuit court of the United States for the southern district of Georgia. May rules, 1874. Harvey Terry, Joshua Green, et al., complainants, and Edward C. Anderson, jr., E. C. Anderson, jr., exor., &c., et al., defendants. In equity. Original subpœna in equity. Filed sixth day of April, A. D. 1874. Jas. McPherson, clerk. D. T. Corbin, complainants' solicitor.

38 *Returns of service by marshal..*

I have served two copies of the within subpœna upon the within-named Edward C. Anderson, personally, at Savannah, Ga., April 6th, 1874; also a copy upon Thomas H. Harden and N. B. Knapp, personally, at Savannah, Ga., April 7th, 1874; and upon Andrew Low, jr., by leaving the same at his residence in Savannah, April 7th, 1874; and upon Mary Telfair by leaving the same at her residence in Savannah, Ga., April 7th, 1874. And after due and diligent search I find that the within-named Robert W. Flournoy, W. H. Cuyler, John C. Nicholl, Wm. Robinson, and H. W. Mercer are not to be found within this district.

The return of—

W. H. SMYTH,
U. S. Marshal,
Per A. B. SMITH,
Deputy.

Due and diligent search having been made I am unable to find the within-named C. A. Baynard in my district.

The return of—

W. H. SMYTH,
U. S. Marshal,
By C. P. FREEMAN,
Depy.

SAVANNAH, GA., *April 8th*, 1874.

39 *Amendment to complainants' bill.*

To the honorable the judges of the circuit court of the United States for the said district:

Now comes Harvey Terry, Joshua Green, complainants in the above-entitled cause, by their solicitor, D. T. Corbin, and amend their bill of complaint in said cause as follows, to wit: In the introductory part of

said bill of complaint, on page three, (3,) after the words "H. W. Mercer, a citizen of the State of Maryland," insert the words "and Isaac Henry, as executor of the last will and testament of J. P. Henry, deceased, and Wallace Cumming, executor of the last will and testament of Anthony Porter, deceased, John L. Villalonga, and Mary M. Marshall."

In section fourteen, (14,) on page twelve, (12,) after the words "William Robinson owned three hundred and forty shares, on which there was paid the sum of twenty-seven thousand two hundred dollars," add the following words, "Mary Telfair owned seventy-eight shares on which there was paid six thousand three hundred and forty dollars; Isaac Henry, as executor of the last will and testament of J. P. Henry, deceased, owned ninety-five shares upon which there had been paid eight thousand dollars; Wallace Cumming, as executor of the last will and testament of Anthony Porter, deceased, owned two hundred and fifteen shares on which there was paid eighteen thousand and ten dollars; John L. Villalonga owned forty-one shares, on which three thousand two hundred and eighty dollars had been paid; Mary M. Marshall owned seventy-nine shares, on which there was paid seven thousand and seventy dollars."

In the prayer for subpœna, on page eighteen of said bill of complaint, after the words "and Hugh W. Mercer," insert the words "Isaac Henry, as executor of J. P. Henry, Wallace Cumming, as executor of Anthony Porter, John L. Villalonga, and Mary M. Marshall."

At the end of the "note," on page 18, and before the name of the complainants' solicitor, insert the words, the "defendants, Isaac Henry, as executor of J. P. Henry, and Wallace Cumming, executor of Anthony Porter; John Villalonga, and Mary M. Marshall, are required to answer interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 16, 17, 18, 19, 20, & 21."

D. T. CORBIN,
Complainants' Solicitor.

UNITED STATES OF AMERICA,
Southern District of Georgia:

Personally appeared before me Harvey Terry, one of the complainants in the above-entitled cause, to which the foregoing is an amendment, who, on oath, says that said bill of complaint as amended is true of his own knowledge, except to the matters therein stated on information and belief; and as to those matters he believes it to be true.

HARVEY TERRY.

Sworn to before me this 11th day of May, A. D. 1874.

JAS. McPHERSON,
Clerk.

(Endorsement:) U. S. circuit court southern district of Georgia. In equity. Harvey Terry et al. vs. Edward C. Anderson, jr., et al., defendants. Amendment to complainants' bill of complaint. Filed this 11th day of May, 1874. Jas. McPherson, clerk. D. T. Corbin, solr. for complts.

Taird subpœna in equity.

The President of the United States of America to Isaac Henry, executor of J. P. Henry, deceased; Wallace Cumming, executor of Anthony Porter, deceased; John L. Villalonga, and Mary M. Marshall, greeting:

For certain causes offered before the judges of the circuit court of

the United States for the southern district of Georgia, in equity, you, and every of you, are hereby commanded and strictly enjoined that, laying all other matters aside and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said
42 court, in the city of Savannah, at rules to be had on the first Monday in July next, to answer to those things which shall then and there be objected to you in a bill and amended bill filed by the said complainants, and to do further and receive what the said court shall have considered in that behalf; and this you may in no wise omit under penalty of five hundred dollars. And have here this writ.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Savannah, this 11th day of May, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JAS. McPHERSON, *Clerk.*

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated, in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken pro confesso.

D. T. CORBIN,
Solicitor for Complainant.

(Endorsement:) In the circuit court of the United States for the southern district of Georgia. July rules, 1874. In equity. Harvey Terry et al., complainants, and Edward C. Anderson, jr., et al., defendants. Original subpœna in equity. Filed 11th day of May, A. D. 1874. Jas. McPherson, clerk. D. T. Corbin, complainants' solicitor.

43 *Marshal's return of service.*

I have served a copy of the within subpœna upon the within-named Mary M. Marshall, personally, in Savannah, Ga., May 11th, 1874, and upon Wallace Cuming and John S. Villalonga, personally, in Savannah, Ga., May 12th, 1874.

The return of—

W. H. SMITH,
U. S. Marshal,
Per A. B. SMITH,
Deputy.

That the within-named Isaac Henry is not to be found in this district.

Return of—

W. H. SMITH,
U. S. Marshal,
Per J. W. JUDKINS,
Deputy Marshal.

44 *Demurrer of Thomas H. Harden.*

The demurrer of Thomas H. Harden, one of the defendants, to the bill of complaint of Harvey Terry and Joshua Green and Thomas Green, complainants.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said

complainants have not by their said bill stated, charged, or shown that this defendant has, or pretends to have, any right, title, or interest in the matters and things complained of by the said bill, or any of them, or any right to call upon this defendant in a court of equity for a discovery of the said matters and things or any of them. And that for anything that appears to the contrary by the said bill this defendant may be examined as a witness in this suit.

Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

WM. D. HARDEN,
Defendants' Solicitors.

45 (Endorsement:) In the 5th circuit court of the United States for the southern district of Georgia. June rules, 1874. In equity. Harvey Terry et al. vs. Edward C. Anderson et al. Demurrer of Thomas H. Harden, one of the defendants. Filed June 1, 1874. Jas. McPherson, clerk. Wm. D. Harden, defendants' solicitor.

Plea of Edward C. Anderson, jr., as executor.

The defendant Edward C. Anderson, jr., as executor, etc., by protestation not confessing or acknowledging all or any of the matters and things in the said complainants' said bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for plea saith that this defendant is not now, and was not at the time of the filing of the said complainants' said bill, the executor or legal representative of the said George W. Anderson as in said bill alleged; all which matters and things this defendant avers to be true, and pleads the same to the said bill, and humbly demands the judgment of this honorable court.

HARTRIDGE & CHISHOLM,
Solrs. for Deft.

46 You, Edward C. Anderson, jr., do swear that the foregoing pleas is true in point of fact.

EDWARD C. ANDERSON, JUNR.

Sworn to and subscribed before me this first day of June, 1874.
[SEAL.] CHAS. C. HUNTER,
Notary Public, C. Co.

We do hereby certify that the foregoing plea in our opinion is well founded in point of law.

HARTRIDGE & CHISHOLM,
Solrs. for Deft.

JUNE 1, 1874.

(Endorsement:) In the 5th district court of U. S., southern district of Georgia. Harvey Terry, Joshua Green, and Thomas Green, complainants, against Edward C. Anderson, jr., Edward C. Anderson, jr., as executor, etc., C. A. Baynard, Robert W. Flournoy et al., defendants. In equity. Plea of Edward C. Anderson, jr., as executor. Filed June 1, 1874. Jas. McPherson, clerk. Hartridge & Chisholm, solicitors for defendants.

47 *Demurrer of Edward C. Anderson, jr.*

The demurrer of Edward C. Anderson, jr.:

This defendant, by protestation not confessing or acknowledging all or any of the matters or things in the said complainants' bill contained to be true in such manner and form as the same are therein and thereby set forth and alleged, does demur to the said bill, and for cause of demurrer shows that the said complainants have not by their said bill made such a case as entitles them in a court of equity to any discovery from this defendant, or to any relief, against him, as to the matters contained in the said bill or any of such matters, and that any discovery that can be made by this defendant touching the matters complained of in the said bill or any of them cannot be of any avail to the said complainants for any of the purposes for which a discovery is sought against this defendant by the said bill nor entitle the said complainants to any relief in this court touching any of the matters therein complained of. Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and he humbly prays
48 to be hence dismissed with his reasonable costs in this behalf sustained.

HARTRIDGE & CHISHOLM,
Solrs. for Deft.

We do hereby certify that in our opinion *that* the foregoing demurrer is well founded in point of law.

HARTRIDGE & CHISHOLM,
Solrs. for Deft.

JUNE 1, 1874.

You, Edward C. Anderson, jr., do swear that the foregoing demurrer is not interposed for delay.

EDWARD C. ANDERSON, JUNR.

Sworn to before me this June 1, 1874.
[SEAL] CHARLES C. HUNTER,
Notary Public, C. Co.

(Endorsement:) In the 5th circuit court of U. S., southern district of Georgia. In equity. Harvey Terry, Joshua Green, and Thomas Green, complainants, against Edward C. Anderson, jr., Edward C. Anderson, jr., as executor, etc., C. A. Baynard, Robert W. Flournoy et al., defendants. Demurrer of Edward C. Anderson, jr. Filed June 1, 1874. Jas. McPherson, clerk. Hartridge & Chisholm, solicitors for defendants.

49 *Demurrer of N. B. Knapp.*

The demurrer of Noah B. Knapp, one of the defendants to the bill of complaint of Harvey Terry and Joshua Green and Thomas Green, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows that the complainants have not, in and by their said bill, made or stated such a case as does or ought to entitle them, or either of them, to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

And for a further cause of demurrer to the whole of the said bill, the said defendant shows that the said several causes of action in the said bill set forth, if any such there were or are, existed before the first day of June, eighteen hundred and sixty-five, as appears by the said bill; yet the said complainants did not file their said bill until the sixth day of April, eighteen hundred and seventy-four, after the first day of January, eighteen hundred and seventy.

And for a cause of demurrer to that much and those parts of the said bill by and in which the said complainants seek to recover
50 from the said defendant any sum or sums of money alleged to be in the hands of this defendant as unpaid subscription for stock in the said bank upon the ground that such unpaid subscriptions were or are assets of the said bank, the said defendant shows that it is alleged in the said bill that the said complainants were, each and all, defendants to a bill heretofore filed by George W. Anderson and Hugh W. Mercer, as assignees of all the assets of the said bank, for the payment of creditors of the same in the superior court of Chatham County, in this State, against the said complainants in this suit and others as creditors of the said bank, for instruction as to the distribution of such assets and the final winding up of the affairs of the said bank in pursuance of the said assignment, in which said suit a final decree was rendered by the said superior court, distributing the said assets and discharging the said assignees, and that they, the said complainants, participated in said distribution; yet the said complainants allege no excuse or reason for not seeking the aid of that court, as it was competent for them to do, to require the said assignees to collect the assets now sued for, if any such there were, or why the said decree should not be binding and conclusive upon them as a final settlement of the affairs of the said bank.

And for a cause of demurrer to that much and those parts of
51 the said bill wherein and whereby the said complainants seek to recover from this defendant the amount of his alleged proportionate liability as a stockholder in said bank for the bills of the bank held by the said complainants under the third sections of the acts of 1836 and 1859, extending the charter of the said bank, the said defendant shows that the substance of the third sections is alleged in the said bill, whereby it appears that the said alleged liability is for the ultimate redemption of the bills or notes issued by or from said bank during the time he may have held such stock; yet the said complainants have not alleged that this defendant held any stock in the said bank at any time when any of their said bills were issued.

And for a cause of demurrer to that much and those parts of the said bill wherein and whereby the said complainant, Harvey Terry, seeks to recover against this defendant upon or by reason of certain bills of the said bank, amounting to fourteen hundred and sixty-four dollars, ($1,464,) this defendant shows that the said bill does not set forth whether he became the holder of the said bills before or after the aforesaid final decree of the superior court, or why they were not presented by the said Terry for participation in the distribution of the assets directed thereby.

52 Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant prays the judgment of the court whether he shall be compelled to make any other or further answer to the said bill, and prays that he may be hence dismissed with his reasonable costs in this behalf sustained.

JACKSON, LAWTON & BASINGER,
Defts.' Sol'rs.

The undersigned, of counsel for the said Noah B. Knapp in the above cause, hereby certifies that in his opinion the foregoing demurrer is well founded in point of law.

WM. S. BASINGER.

UNITED STATES OF AMERICA,
Southern District of Georgia:

The above-named Noah B. Knapp comes before the undersigned and deposes that the foregoing demurrer is not interposed for delay.

NOAH B. KNAPP.

Sworn to and subscribed before me this 1st day of June, A. D. 1874.

DANIEL R. GROVER,
Not. Pub. C. C., Ga.

(Endorsement:) In U. S. circuit court for southern dist. of Ga. June rules, 1874. In equity. Harvey Terry et al., complts., and Edwd. C. Anderson, junior, et al., defts. Demurrer of N. B. Knapp. Filed June 1, 1874. Jas. McPherson, clerk. Jackson, Lawton & Basinger, defts.' sol'rs.

53 *Demurrer of Mary Telfair.*

The demurrer of Mary Telfair, one of the defendants to the bill of complaint of Harvey Terry and Joshua Green and Thomas Green, complainants.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows that the said complainants have not, in and by their said bill, made or stated such a case as does or ought to entitle them or either of them to any such discovery or relief as is thereby sought and prayed for against this defendant.

And for a further cause of demurrer to the whole of the said bill, the said defendant shows that the said several causes of action in the said bill set forth, if any such there were or are, existed before the first day of June, eighteen hundred and sixty-five, as appears by the said bill; yet the said complainants did not file their said bill until the sixth day of April, eighteen hundred and seventy-four, after the first day of January, 1870.

And for a cause of demurrer to that much and those parts of the said bill, by and in which the said complainants seek to recover from the said defendant any sum or sums of money alleged to be in
54 the hands of this defendant as unpaid subscription for stock in the said bank, upon the ground that such unpaid subscriptions were or are assets of the said bank, the said defendant shows that it is alleged in the said bill that the complainants were, each and all, defendants to a bill heretofore filed by George W. Anderson and Hugh W. Mercer, as assignees of all the assets of the said bank for the payment of creditors of the same, in the superior court of Chatham County, in this State, against the said complainants in this suit and others, as creditors of the said bank, for instruction as to the distribution of such assets and the final winding up of the affairs of the said bank in pursuance of the said assignment, in which said suit a final decree was rendered by the said superior court, distributing the said assets and discharging the said assignees, and that they, the said complainants, participated in said distribution; yet the said complain-

ants allege no excuse or reason for not seeking the aid of that court, as it was competent for them to do, to require the said assignees to collect the assets now sued for, if any such there were, or why the said decree should not be binding and conclusive upon them as a final settlement of the affairs of the said bank.

And for a cause of demurrer to that much and those parts of the said bill wherein and whereby the said complainants seek to re-
55 cover from this defendant the amount of his alleged proportionate liability as a stockholder in said bank for the bills of the bank held by the said complainants under the third sections of the acts of 1836 and 1859, extending the charter of the said bank, the said defendant shows that the substance of the said third sections is alleged in the said bill, whereby it appears that the said alleged liability is for the ultimate redemption of the bills or notes issued by or from said bank during the time she may have held such stocks; yet the said complainants have not alleged that this defendant held any stock in the said bank at any time when any of the said bills were issued.

And for a cause of demurrer to that much and those parts of the said bill wherein and whereby the said complainant, Harvey Terry, seeks to recover against this defendant, upon or by reason of certain bills of the said bank, amounting to fourteen hundred and sixty-four dollars, ($1,464,) this defendant shows that the said bill does not set forth whether she became the holder of the said bills before or after the aforesaid final decree of the superior court, or why they were not presented by the said Terry for participation in the distribution of the assets directed thereby.

Wherefore, and for divers other good causes of demurrer ap-
56 pearing in the said bill of complaint, this defendant prays the judgment of the court whether she shall be compelled to make any other or further answer to the said bill, and prays that she may be hence dismissed with her reasonable costs in this behalf sustained.

JACKSON, LAWTON & BASINGER,
Defts. Solrs.

The undersigned, of counsel for the said Mary Telfair in the above cause, hereby certifies that in his opinion the foregoing demurrer is well founded in point of law.

WM. S. BASINGER.

UNITED STATES OF AMERICA,
Southern District of Georgia:

The above-named Mary Telfair comes before the undersigned, and deposes that the foregoing demurrer is not interposed for delay.

MARY TELFAIR.

Sworn to and subscribed before me this 1st day of June, A. D. 1874.

DANIEL R. GROVER,
Not. Pub. C. C., Ga.

(Indorsement:) In U. S. circuit court for southern dist. of Ga. June rules, 1874. In equity. Harvy Terry et al., complts., and Edward C. Anderson, junior, et al., defts. Demurrer of Mary Telfair. Filed June 1, 1874. Jas. McPherson, clerk. Jackson, Lawton & Basinger, deft.'s solrs.

57 *Petition to amend bill, and order thereon.*

To the honorable the judges of the circuit court of the United States for the southern district of Georgia:

The petition of the above-named complainants, by D. T. Corbin, their solicitor, respectfully shows that the bill herein was filed on the day of April, 1874. That certain of the defendants filed on the rules day in June last demurrers and pleas, and that no replications have yet been filed by these complainants. Wherefore they humbly pray that they may have leave to amend their said bill filed herein in the following particulars, viz:

In paragraph II of said bill, by inserting between the words "incorporation" and "and" in the second line of the printed bill the words "and during the time the said defendants held the shares of stock hereinafter mentioned, in the said bank."

By adding the following interrogatory to follow immediately after interrogatory 23, on page 17 of the printed bill, viz:

"24th. Whether the said notes enumerated in Exhibit A, and also those on which judgment was rendered in favor of these complainants as alleged in paragraph VII of said bill were not issued during the time when the defendant' held their shares of stock of the said bank."

By adding to the note on page 18 of the printed bill the number
58 "24" at the end of the first, second, and third paragraphs of said note.

And your petitioners will ever pray, &c.

D. T. CORBIN,
Solr. for Complainants.

Order.

On reading the foregoing petition, and on motion of D. T. Corbin, esq., complainants' solicitor,

Ordered, That the complainants have leave to file the amendments to said bill as prayed for in said petition.

JOHN ERSKINE,
U. S. Judge.

JULY 6TH, 1874.

(Endorsement:) U. S. A. Southern dist. of Georgia. In equity, Harvey Terry et al. vs. Edward C. Anderson, jr., Edward C. Anderson, jr., as executor, &c., et al. Petition to amend bill and order thereon. Filed July 8th, 1874. Jas. McPherson, clerk. Corbin.

Marshal's return.

I have this day served a copy of the within petition upon the within-named Mess. Hartidge & Chisholm, & Jackson, Lawton & Basinger, personally, at Savannah, Ga., July 10, 1874.

The return of—

W. H. SMYTH,
U. S. Marshal,
Per A. B. SMYTH,
Depy.

59 *Amendment to bill.*

And now comes the said complainants, by their solicitor, D. T. Corbin, esq., and, by leave of the court first had and obtained, amend their said bill of complaint in the following particulars, namely:

1. By inserting in paragraph II of said bill between the words "incorporation" and "and" in the second line of the printed bill the words "and during the time the said defendants held the shares of stock hereinafter mentioned in the said bank."

2. By adding the following interrogatory to follow immediately after interrogatory 23d, on page 17 of said printed bill, viz: "24th. Whether the said notes enumerated in Exhibit A, and also those on which judgment was rendered in favor of the complainants as alleged in paragraph VII of said bill, were not issued during the time when the defendant held his or her shares of stock of said bank."

3. By adding to the note on page 18 of the printed bill the number "24" at the end of the first, second, and third paragraphs of said note.

D. T. CORBIN,
Complainants' Solicitor.

(Endorsed:) Amendment to bill. Filed July 6th, 1874. Jas. McPherson, clerk. D. T. Corbin, complts. slrs.

60 *Demurrer of John S. Villalonga.*

The demurrer of John S. Villalonga, one of the defendants, to the bill of complaint of Harvey Terry and Joshua Green and Thomas Green, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows that the said complainants have not, in and by their said bill, made or stated such a case as does or ought to entitle them or either of them to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

And for a further cause of demurrer to the whole of the said bill, the said defendant shows that the said several causes of action in the said bill set forth, if any such there were or are, existed before the first day of June, eighteen hundred and sixty-five, as appears by the said bill; yet the said complainants did not file their said bill until the sixth day of April, 1874, after the first day of January, 1870.

And for a cause to that much and those parts of the said bill by and in which the said complainants seek to recover from the said defendant any sum or sums of money alleged to be in the hands of the said defendant as unpaid subscriptions for stock in bank, upon
61 the ground that such unpaid subscriptions were or are assets of the said bank, the said defendant shows that it is alleged in their said bill that the said complainants were each and all defendants to a bill heretofore filed by George W. Anderson and , as assignees of all the assets of the said bank, for the payment of creditors of the same, in the superior court of Chatham County, in this State, against the said complainants in this suit and others as creditors of the said bank, for instructions as to the distribution of such assets and the final winding up of the affairs of the said bank in pursuance of said assignment; in

which said suit a final decree was rendered by the said superior court distributing the said assets and discharging the said assignees, and that they, the said complainants, participated in said distribution, yet the said complainants allege no excuse or reason for not seeking the aid of that court, as it was competent for them to do, to require the said assignees to collect the assets now sued for, if any such there were, or why the said decree should not be binding and conclusive upon them as a final settlement of the affairs of the said bank.

And for a cause of demurrer to that much and those parts of the said bill, wherein and whereby the said complainants seek to recover from this defendant the amount of his alleged proportionate liability as a
62 stockholder in said bank for the bills of the bank held by the said complainants, under the third section of the acts of 1836 and 1859, extending the charter of the said bank, the said defendant shows that the substance of the said third is alleged in the said bill, whereby it appears that the said alleged liability is for the ultimate redemption of the bills or notes issued by or from said bank during the time he may have held such stock, yet the said complainants have not alleged that this defendant held any stock in the said bank at any time when any of the said bills were issued.

And for cause of demurrer to that much and those parts of the said bill wherein and whereby the said complainant Harvey Terry seeks to recover against this defendant upon or by reason of certain bills of the said bank, amounting to fourteen hundred and sixty-four dollars, ($1,464,) this defendant shows that the said bill does not set forth whether he became the holder of the said bills before or after the aforesaid final decree of the superior court, or why they were not presented by the said Terry for participation in the distribution of the assets directed thereby.

Whereupon and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant prays the judgment of the court, whether he shall be compelled to make any other or further answer to the said bill, and prays that he may be hence dismissed
63 with his reasonable costs in this behalf sustained.

HARTRIDGE & CHISHOLM,
Solicitors for Jno. L. Villalonga.

You, John L. Villalonga, one of the defendants in said cause, do solemnly swear that the foregoing demurrer is not interposed for delay.

JOHN L. VILLALONGA.

Sworn to and subscribed before me this 6th day of July, 1874.

G. A, HOWELL,
Not. Pub. C. C., Ga.

(Endorsement:) In the U. S. circuit court, so. dist. of Georgia. Harvey Terry et al., complainants, vs. Edward C. Anderson, jr., et al., defendants. In equity. Demurrer of John L. Villalonga. Filed July 6, 1874. Jas. McPherson, clerk. Hartridge & Chisholm, sols. for defendant.

64 *Demurrer of E. C. Anderson, jr., set down for argument.*

The complainants herein set down this case for argument immediately on the bill and the demurrer filed herein by the defendant Edward C. Anderson, jr.

D. T. CORBIN,
Complainants' Solicitor.

JULY 6, 1874.

(Endorsed:) Sets down demurrer of Edward C. Anderson, jr., for argument. Filed July 6th, 1874. Jas. McPherson, clerk. D. T. Corbin, complts.' solr.

Petition to dismiss bill as to E. C. Anderson, jr., &c., et al.

To the honorable the judges of the United States for the said court:

The humble petition of the complainants herein, by D. T. Corbin, esq., their solicitor, showeth that your petitioners having exhibited their bill in this honorable court against the defendants, Edward C. Anderson, jr., as executor of the will of George W. Anderson, deceased, and Thomas H. Harden, who have appeared and filed their pleas thereto, your petitioners are now advised to dismiss their said bill as to said
65 defendants.

Your petitioners therefore humbly pray that the said bill may stand dismissed out of this court as to Edward C. Anderson, jr., as executor, etc., and Thomas H. Harden, with costs to be taxed by the clerk of this court.

D. T. CORBIN,
Solic. for Complainants.

JULY 6, 1874.

(Endorsement:) U. S. A., southern dist. of Geo., circuit court. In equity. Harvey Terry, a citizen of South Carolina, et al., vs. Edward C. Anderson, jr., individually and as executor, C. A. Baynard, et al. Petition of complainants to dismiss bill as to Edward C. Anderson, jr., as executor, and Thomas H. Harden. Filed July 6th, 1874. Jas. McPherson, clerk. D. T. Corbin, complts.' solrs.

Plea of Wallace Cumming as executor, &c.

The plea of Wallace Cumming, sued as executor of Anthony Porter, one of the defendants, to the bill of complaint of Harvey Terry and Joshua Green and Thomas Green, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint con-
66 tained to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said bill says that he is not nor ever has been executor of Anthony Porter, as the said complainants have in their said bill untruly alleged: Wherefore this defendant doth plead in bar to the said bill of complaint and prays the judgment of the court whether he shall be compelled to make any further answer to the said bill, and prays to be hence dismissed with his costs.

JACKSON, LAWTON & BASINGER,
Defts.' Solrs.

The undersigned, of counsel for the above-named defendant, hereby certifies that in his opinion the foregoing plea is well founded in point of law.

WM. S. BASINGER.

JULY 6, 1874.

UNITED STATES OF AMERICA,
Southern District of Georgia:

The above-named Wallace Cumming comes before the undersigned and deposes that the foregoing plea is true in point of fact.

W. CUMMING.

Sworn to and subscribed before me this July 2nd, A. D. 1874.
DANIEL R. GROVER,
Notary Public C. C., Ga.

(Endorsement:) In U. S. circuit court for so. dist. of Georgia.
67 July rules, 1874. In equity. Harvey Terry et al., complts., and Edward C. Anderson, jr., et al., defts. Plea of Wallace Cumming, sued as exor. of A. Porter. Filed July 6, 1874. Jas. McPherson, clerk. Jackson, Lawton & Basinger, defts.' solrs.

Demurrer of Mary M. Marshall.

The demurrer of Mary M. Marshall, one of the defendants to the bill of complaint of Harvey Terry and Joshua Green, complainants.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows that the said complainants have not in and by their said bill made or stated such a case as does or ought to entitle them, or either of them, to any such discovery or relief as is thereby sought and prayed for against this defendant.

And for further cause of demurrer to the whole of the said bill the said defendant shows that the said several causes of action in the said bill set forth, if any such there were or are, existed before the
68 first day of June, eighteen hundred and sixty-five, as appears by the said bill; yet the said complainants did not file their said bill until the sixth day of April, eighteen hundred and seventy-four, after the first day of January, eighteen hundred and seventy.

And for cause of demurrer to that much and those parts of the said bill by and in which the said complainants seek to recover from the said defendant any sum or sums of money alleged to be in the hands of this defendant as unpaid subscription for stock in the said bank, upon the ground that such unpaid subscriptions were or are assets of the said bank, the said defendant shows that it is alleged in the said bill that the said complainants were each and all defendants to a bill heretofore filed by George W. Anderson and Hugh W. Mercer, as assignees of all the assets of the said bank for the payment of creditors of the same, in the superior court of Chatham County, in this State, against the said complainants in this suit and others as creditors of the bank, for instruction as to the distribution of such assets and the final winding up of the affairs of the said bank in pursuance of the said assignment, in which said suit a final decree was rendered by the said superior court, distributing the said assets and discharging the said assignees, and that they, the said complainants, participated
69 in said distribution; yet the said complainants allege no excuse or reason for not seeking the aid of that court, as it was competent for them to do to require the said assignees to collect the assets now sued for, if any such there were, or why the said decree should not be binding and conclusive upon them as a final settlement of the affairs of the said bank.

And for a cause of demurrer to that much and those parts of the said bill wherein and whereby the said complainants seek to recover from this defendant the amount of his alleged proportionate liability as a stockholder in said bank for the bills of the bank held by the said complainants under the third sections of the acts of 1836 and 1859, extending

the charter of the said bank, the said defendant shows that the substance of the said third sections is alleged in the said bill, whereby it appears that the said alleged liability is for the ultimate redemption of the bills or notes issued by or from said bank during the time she may have held such stock; yet the said complainants have not alleged that this defendant held any stock in the said bank at any time when any of their said bills were issued.

And for a cause of demurrer to that much and those parts of the said bill wherein and whereby the said complainant, Harvey Terry, seeks to recover against this defendant upon or by reason of certain bills
70 of the said bank, amounting to fourteen hundred and sixty-four dollars, ($1,464,) this defendant shows that the said bill does not set forth whether she became the holder of the said bills before or after the aforesaid final decree of the superior court, or why they were not presented by the said Terry for participation in the distribution of the assets directed thereby.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant prays the judgment of the court whether she shall be compelled to make any other or further answer to the said bill, and prays that she may be hence dismissed with her reasonable costs in this behalf sustained.

JACKSON, LAWTON & BASINGER,
Defts.' Solrs.

The undersigned, of counsel for the said Mary M. Marshall in the above cause, hereby certifies that in his opinion the foregoing demurrer is well founded in point of law.

WM. S. BASINGER.

UNITED STATES OF AMERICA,
Southern District of Georgia:

The above-named Mary M. Marshall comes before the undersigned and deposes that the foregoing demurrer is not interposed for delay.

MARY M. MARSHALL.

Sworn to and subscribed before me this 6th day of July, A. D. 1874.

S. ELSINGER,
N. P. & J. P.

71 (Endorsement:) In the U. S. circuit court for southern dist. of Georgia. July rules, 1874. In equity. Harvey Terry et al., compls., and Edward C. Anderson, junior, et al., defendants. Demurrer of Mary M. Marshall. Filed July 6, 1874. Jas. McPherson, clerk. Jackson, Lawton & Basinger, defts.' attys.

Second original subpœna in equity.

The President of the United States of America to Andrew Low, junior, greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court in the city of Savannah, at rules to be had on the first Monday in August next, to answer to those things which shall then and there be objected to you in a bill of complaint filed by the said complainants, and to do further and receive what

the said court shall have considered in that behalf; and this you may in no wise omit under penalty of five hundred dollars, and have here this writ.

72 Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JAS. McPHERSON, *Clerk.*

MEMORANDUM.—The defendant is to enter his appearance in the suit above stated in the clerk's office on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken pro confesso.

D. T. CORBIN,
Solicitor for Complainants.

(Endorsement:) In the circuit court for the United States for the southern district of Georgia. August rules, 1874. In equity. Harvey Terry, Joshua Green, et al., complainants, and Edward C. Anderson, jr., Edward C. Anderson, jr., exr., &c., defendants. Second original subpœna in equity for Andrew Lowe. Filed 8th day of July, A. D. 1874. Jas. McPherson, clerk. D. T. Corbin, complainants' solicitor.

Marshal's return.

I certify that on the 9th day of July, A. D. 1874, at Savannah, Ga., in my district, I personally served the within writ on the within named Andrew Low, by leaving a copy thereof at his usual place of abode with Thos. Milledge, a person of color who is in charge of the premises;

73 said Low not being within this jurisdiction, and there being no member of his family at his residence.

The return of—

W. H. SMYTH,
U. S. Marshal,
Per A. B. SMITH,
Deputy.

Demurrer of Mary M. Marshall set for argument.

Now comes Harvey Terry et al., complainants, by D. T. Corbin, solicitor, and sets down the demurrer of Mary M. Marshall, one of defendants in above cause, for argument forthwith.

D. T. CORBIN,
Solicitor for Complainants.

AUG. 3d, 1874.

(Endorsement:) U. S. cir. court so. dist. of Georgia. In equity Harvey Terry et al. vs. Edward C. Anderson, jr., et al., complainants. Set down demurrer of Mary M. Marshall for argument. D. T. Corbin, solr. for complainants. Filed Aug. 4th, 1874. Jas. McPherson, clerk.

Demurrer of J. L. Villalonga set for argument.

Now comes the complainants, Harvey Terry et al., by their solicitor, D T. Corbin, and sets down for argument forthwith the demurrer of

74 John L. Villalonga, defendant in the above-entitled cause.

D. T. CORBIN,
Solicitor for Complainants.

AUG. 3, 1874.

(Endorsement:) U. S. cir. court so. dist. of Ga. In equity. Harvey Terry et al. vs. Edward C. Anderson, jr., et al. Complainants set down demurrer of John L. Villalonga for argument. D. T. Corbin, solr. for complainants. Filed Aug. 4, 1874. Jas. McPherson, clerk.

Motion to dismiss bill as to W. Cumming.

To the honorable the circuit judges of said district:

Now comes Harvey Terry et al., complainants in the above-entitled cause, by their solicitor, D. T. Corbin, and moves to dismiss said bill as to Wallace Cumming, one of defendants.

D. T. CORBIN.
Solicitor for Complainants.

AUG. 3d, 1874.

(Endorsement:) U. S. circuit court so. dist. of Georgia. In equity. Harvey Terry et al. vs. Edward C. Anderson, jr., et al. Complainants move to dismiss bill as to Wallace Cumming. D. T. Corbin, solr. for complainants. Filed Aug. 4, 1874. Jas. McPherson, clk.

75 *Consent order dismissing bill as to T. H. Harden.*

By consent of the complainants and said defendant in said cause said demurrer is well taken and admitted good, and the bill of said complainants, so far as the same refers to said Thomas H. Harden, is dismissed at complainants' costs.

W. B. WOODS, *Judge.*

I consent.

D. T. CORBIN,
Solr. for Complainant.
WM. D. HARDEN,
Solr. for Thos. H. Harden.

(Endorsement:) U. S. cir. court so. dist. of Georgia. In equity. Harvey Terry et al., complts., vs. E. C. Anderson, jr., adm., et al., dfts. Consent order dismissing bill on demurrer as to T. H. Harden, dft., at compl'ts' costs. Filed Dec. 7, 1874. Jas. McPherson, clerk. Consent.

Order sustaining demurrer to compl'ts' bill, &c.

Upon hearing argument upon the demurrer filed in the above-entitled cause, it is ordered that the said demurrer be sustained, and complainants declining to amend their bill, it is further ordered that the same be dismissed with costs.

W. B. WOODS, *Judge.*

DEC. 9, 1874.

76 (Endorsement:) U. S. cir. court so. dist. of Georgia. In equity. Harvey Terry et al. vs. E. C. Anderson et al. Order sustaining demurrer to complt.' bill of complt. & dismissing bill. Filed Dec. 9, 1874. Jas. McPherson, clerk.

Motion for appeal and allowance of same.

And now comes D. T. Corbin, solicitor for the complainants, and prays an appeal to the Supreme Court of the United States from the

decree of the court in this cause sustaining the demurrers filed in this cause by defendants, Edward C. Anderson, jr., Thomas H. Harden, Mary M. Marshall, John L. Villalonga, Mary Telfair, and N. B. Knapp, and dismissing the bill.

D. T. CORBIN,
Per F. A. BERLIN.

And the same is allowed and the penalty of the appeal-bond fixed at $500.

W. B. WOODS, *Judge.*

(Endorsement:) U. S. cir. court, so. dist. of Georgia. In equity. Harvey Terry et al. vs. E. C. Anderson et al. Motion for appeal and allowance of same. Filed Dec. 9, 1874. Jas. McPherson, clerk. Corbin.

77 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia:

I, James McPherson, clerk of the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that the foregoing pages, numbered from 2 to 76, inclusive, contain a true and complete transcript of all the papers, exhibits, and other proceedings (there being no depositions or testimony on file) in the case of Harvey Terry, Joshua Green, and Thomas Green, complainants, and Edward C. Anderson, junior, Edward C. Anderson, junior, executor, &c., C. A. Baynard and others, defendants, as the same remain of record and of file in said office.

Witness my hand and the seal of the said 5th circuit court of the United States for the said district this the twenty-third day of December, eighteen hundred and seventy-four.

[SEAL.] JAS. McPHERSON, *Clerk.*

78 *Bond.*

Know all men by these presents that we, Harvey Terry, of the city of Columbia, South Carolina, and A. N. Wilson, of Savannah, Georgia, are held and firmly bound unto Edward C. Anderson, jr., Edward C. Anderson, jr., as executor of the last will and testament of George W. Anderson, decd., C. A. Baynard, Robert W. Flournoy, N. B. Knapp, Andrew Low, jr., W. H. Cuyler, John C. Nicholl, William Robinson, Mary Telfair, Thomas H. Harden, and H. W. Mercer, in the full and just sum of five hundred dollars, to be paid to them or their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this 9th day of December, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a circuit court of the United States for the southern district of Georgia, held at Savannah, in a suit depending in said court between Harvey Terry, Joshua Green, and Thomas Green as plaintiffs, and Edward C. Anderson, jr., Edward C. Anderson, jr., as executor of the last will and testament of George W. Anderson, decd.,
79 C. A. Baynard, Robert W. Flournoy, N. B. Knapp, Andrew Low, jr., W. H Cuyler, John C. Nicholl, William Robinson, Mary Telfair, Thomas H Harden, and H. W. Mercer, defendants, a decree of

judgment was rendered against the said Harvey Terry, Joshua Green, and Thomas Green; and the said Harvey Terry, Joshua Green, and Thomas Green having obtained leave of the court to appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the said decree of judgment in the aforesaid suit, and a citation directed to the said defendants, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Harvey Terry, Joshua Green, and Thomas Green shall prosecute said appeal to effect, and answer all damage and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HARVEY TERRY. [SEAL.]
ALEX. N. WILSON. [SEAL.]

Approved Dec'r 9th, 1874.

W. B. WOODS, *Judge.*

(Endorsement:) U. S. cir. court so. dist. of Georgia. In equity. Harvey Terry et al. vs. Edward C. Anderson, jr., et al. Bond of Harvey, app'nt. Filed Dec'r 9, 1874. Jas. McPherson, clerk.

80 UNITED STATES OF AMERICA,
Southern District of Georgia:

I, James McPherson, clerk of the fifth circuit court of the United States for said district, do hereby certify that the foregoing paper is a true and perfect copy of the bond given by Harvey Terry and Alexander N. Wilson for the purposes therein mentioned, and of file in my office among the record' in the case of Harvey Terry et al., complainants, against Edward C. Anderson, jr., &c., et al., defendants. Said bond omitted to be copied in the transcript of record of said case for the Supreme Court of the United States.

Witness my hand and the seal of said court, at Savannah, this the fourth day of January, in the year eighteen hundred and seventy-five.

[SEAL.] JAS. McPHERSON, *Clerk.*

(Indorsement on cover:) No. 266. Harvey Terry, Joshua Green, and Thomas Green, appellants, vs. Edward C. Anderson, jr., E. C. Anderson, jr., as excr. of Geo. W. Anderson, decd., C. A. Baynard, Robt. W. Flournoy, N. B. Knapp, Andrew Low, jr., W. H. Cuyler, John C. Nicholl, William Robinson, Mary Telfair, Thomas H. Harden, and H. W. Mercer. S. Georgia C. C. U. S. Filed 13 January, 1875.

REC. 266—3

SUPREME COURT OF THE UNITED STATES.

No. 39.

HARVEY TERRY, JOSHUA GREEN AND THOMAS GREEN, APPELLANTS,

vs.

EDWARD C. ANDERSON, Jr., AND OTHERS, APPELLEES.

PHILADELPHIA BAR ASSOCIATION

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLANTS.

Supreme Court of the U. S.

HARVEY TERRY, JOSHUA GREEN and THOMAS GREEN, *Appellants,* *against* EDWARD C. ANDERSON, Jr., and others, *Appellees.*	*Appeal from Circuit Court of the United States for the Southern District of Georgia.*

This action, in the nature of a creditor's bill, was brought in the Court below by the appellants, in behalf of themselves and others in like condition, against the appellees on the grounds herein set forth, to wit:

The Planters' Bank of the State of Georgia, carrying on business in the City of Savannah, was duly incorporated by the Legislature of Georgia. Its capital stock was fixed at one million dollars, divided into ten thousand shares of one hundred dollars each.

The charter, among other things, provided that the persons and property of the stockholders, for the time being, should "be pledged and bound in proportion to the amount of the shares that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank, during the time he, she or they may hold such stock, in the same manner as in ordinary commercial cases or in simple cases of debt." (Record, f. 3.)

The bank issued a large amount of notes which circulated as money, and some of them came into possession of appellants in due course of trade for value. (Record, f. 4.)

The bank failed to pay its notes in lawful money on the

20th day of February, 1865, and has not paid them since (Record, f. 4), except as hereinafter stated.

On the 26th of May, 1866, the stockholders of the bank, at a meeting duly called, directed the Board of Directors to execute a deed of assignment conveying to George W. Anderson and H. W. Mercer the assets of the bank for the purpose of equal distribution among the creditors and bill holders, and to surrender to the Governor of the State the charter of the bank at such time as they might deem expedient, the stockholders being of opinion that the corporation was insolvent and unable to pay its debts. (Record, fs. 4 and 5.)

On the 9th of July, 1866, the Board of Directors executed in the name of the bank their deed, assigning to the said George W. Anderson and H. W. Mercer the property of the corporation, both real and personal, and, by the same deed of assignment, making said assignees their attorneys irrevocable, in the name of the bank or otherwise, and for the trusts created by said deed, to ask, demand, recover and receive of and from, all and every person and persons, all and singular the property and estate, goods, chattels, wares, merchandize, debts, *choses in action*, sum and sums of money and demands, due and owing or belonging to said bank * * * and, in default of delivery or payment in the premises, to sue, prosecute and implead for the same as they might see fit, &c. A copy of this deed was annexed to bill of complaint as an exhibit. (Record, f. 5, and 31 to 35).

The assignees accepted their trust on the same day, and were finally discharged, June 30, 1873. (Record, fs. 5 and 11.)

Soon after entering upon their duties, said assignees published in the *Savannah News*, for three months, a notice calling upon all bill holders and other persons having claims against the bank to present them for liquidation. (Record, f. 6).

On the 24th December, 1869, Harvey Terry presented to the assignees for liquidation, bills of the said bank to the amount of $5,605.

Joshua and Thomas Green on the day of December, 1869, presented to the assignees for liquidation bills to the amount of $5,791. Upon said bills the appellants received before January 1st, 1870, a dividend of twenty per cent. (Record, f. 7).

Subsequent to the payment of this dividend of 20 per cent., the assignees filed a bill in equity in the Superior Court of Chatham County, Georgia, to which some five hundred and sixty creditors of the bank were made defendants, the appellants among the number.

The object of this bill was to obtain the judgment of the court as to the mode of paying out the assets in the hands of the assignees.

The said court made a decree in the cause, July 14, 1871, whereby it was adjudged, among other things, that there was due to Harvey Terry, the sum of $5,605, less the dividend of twenty per cent. received by him, and also the sum of $1,117 on bills on which he had at the date of said decree, received no dividend. It was adjudged that there was due to J. & T. Green $5,791 on bills of the bank, less the dividend of 20 per cent., previously paid thereon. It was also adjudged that the assignee should pay the balance of assets to all creditors named in the decree, in proportion to their respective dues. (Record, fs. 8 and 9).

In obedience to the said decree, the assignees subsequently paid to appellants further dividends, making the amount received by them 30⅛ per cent. of the face value of their bills, still leaving due them 69⅞ per cent. of the full amount of their bills. (Record, fs. 10, 11.)

On the 18th day of March, 1869, the General Assembly of the State of Georgia passed an act accepting the surrender of the Charter of the Bank. (Record, f. 12.)

The amount of bills outstanding at the time of the failure of the bank was $1,460,112. Of this amount $207,448 were redeemed before the bank executed its deed of assignment on July 9, 1866. A balance remained outstanding at the time of the assignment of $1,155,038. (Record, f. 13.)

Besides the bills which were presented to the assignees by Harvey Terry, on which he received a dividend of 30⅛ per

cent., Mr. Terry is now the owner and holder of bills of said bank to the amount of $1,464 upon which no dividend has been paid. These bills were received for value in due course of trade. (Record, fs. 11 and 12.)

It is alleged in the bill of complaint which set forth all the above stated facts, that at the time of the failure of the bank, the capital stock was not paid in in full, and that many of the stockholders had paid in, on account of their subscriptions to the capital stock, only about eighty per cent. of the same. (Record, f. 14 and 15.)

The appellants allege that the right to sue for and recover the several balances due by the stockholders to make up the full amount of their subscriptions on the shares held by them respectively, passed to the assignees by the deed of the assignment of July 9, 1866, but that the assignees had not exercised their right to collect them, and they have accordingly never been collected. (Record, f. 8.)

The bill propounds interrogatories to the several defendants, stockholders in the bank, relative to the facts alleged in the bill, and concludes with a prayer against the defendants, that they may be decreed to pay such sum upon each share of stock owned and held by them respectively, as shall make up the full sum of one hundred dollars—the par value of the stock—and such further sums respectively as may be found due, in order to pay complainants' demands. (Record, f. 25.)

The bill concludes with a prayer for relief generally and for subpœnas, etc.

The appellees who are now here, demurred to the bill in the court below.

Edward C. Anderson demurred generally. (Record, f. 47.)

The others demurred specially upon the ground, (1st)—that complainants' action was barred by the Statute of Limitations; (2d)—that complainants, although defendants in the case of George W. Anderson and Hugh W. Mercer against T. J. McNish and others, in the Superior Court for Chatham county, allege no reason or excuse for not seeking the aid of that court to require the said assignees to collect the unpaid subscriptions due from the several stockholders,

or why the decree rendered in that cause should not be conclusive and binding upon them; (3d)—that complainants have not alleged that defendants held any stock of the bank when the bills were issued; and, (4th)—that as to the bills amounting to $1,464, as to which Harvey Terry seeks judgment against defendants, the bill does not set forth whether he became the holder of said bills before or after the final decree of the Superior Court of Chatham county, in the said case of Anderson and Mercer, assignees, against McNish and others, or why they were not presented for participation in the distribution of assets of the bank.

(See demurrers of N. B. Knapp, Mary Telfair, John S. Villalonga and Mary M. Marshall. Record, folios 49, 53, 60 and 67.)

The case was heard upon the bill and demurrers, and the bill was dismissed Dec. 9, 1874. (Record, f. 75.)

Assignment of Errors.

The Court below erred in holding that the appellants' right of action was barred by the Statute of Limitations of the State of Georgia, and in holding that the bill did not set forth facts giving appellants a right to recover against the appellees.

Argument.

It is proposed in the argument to consider the points presented by the demurrers in the following order:

1. Whether the holder of stock at the time of the failure of the bank is liable to pay bills of bank outstanding at that time;
2. Whether the appellants have lost their right to sue for the unpaid subscription to the capital stock;
3. Whether the appellants' right of action is barred by the Statute of Limitations of the State of Georgia;
4. Whether Harvey Terry can collect from the stockholders an amount sufficient to pay bills on which he has received no payment out of the assets of the bank.

I.

The liability considered with reference to the time of issue of the bills.

The charter provides that the persons and property of the stockholders for the time being, in said planters' bank, shall be pledged and bound in proportion to the amount of the shares that each individual or company may hold in said bank, for the ultimate redemption of the bills and notes issued by or from the bank during the time he, she, or they may hold such stock, &c.

Prince's Digest, Laws of Geo., 132.

The bill alleges that at the time of the failure of the bank (Record f. 13), at which time the appellees were the holders of stock therein as stated in the bill (Record, f. 14), there were outstanding bills and notes issued by the bank to the amount of $1,460,112.

These outstanding bills were issued from time to time after the incorporation of the bank and prior to May 24, 1866, and certain of them were received in due course of trade, for value, by appellants, by whom they were presented to the assignees for liquidation (Record f. 4 and f. 6 and 7), with the exception of $1,464, held by Harvey Terry.

These bills bore various dates, and were intended to and did circulate as money (Record, f. 14).

These bills had all been issued by and from the bank at the time of its failure.

Each and every outstanding bill of the bank carried with it the promise of the bank to pay *the bearer* the sum stated on its face. This promise was a contract between the bank and the first taker of the bill. The right to demand payment, the right to sue upon the bill in case of non-payment, vested in this taker, and in him only.

When the first taker of the bill delivered it to some other person, then there arose an obligation on the part of the bank to pay this new holder. The promise is now to him. The bill is to be regarded in law as if delivered to him by the bank itself. The bank, therefore, in making the prom-

ise to each new bearer, places him, by means of the bill, in possession of the evidence of the promise and of his right to demand and recover payment thereof.

It is not possible, therefore, to say when any particular bill first issued from the bank, or when it may have come, as a promise to pay, into the hands of a particular person.

The date of the bill is of no value in determining the date of issue.

As was said by the Court in the case of Dougherty *vs.* The Western Bank of Georgia, 13 Georgia, p. 288, as a bank note was issued and re-issued, the date of the bill furnished no evidence of the *time* when it was issued.

It was for this reason that the Court in the case cited, held that the Statute of Limitations did not run against bank bills. This doctrine was subsequently maintained by the same Court in the case of Kimbro *vs.* The Bank of Fulton, 49 Geo., 421; see also Greer *vs.* Perkins, 5 Hump., 592.

It follows, therefore, that as bank bills are constantly issued by the bank without any regard to the date expressed on their face, each and every person obtaining and holding stock in the bank, held it with knowledge of his liability to pay each and every outstanding bill of the bank, in case of the failure of the bank while he was stockholder.

This obligation is inseparable from the ownership of stock.

The purchaser assumed the liabilities of the seller for outstanding bills, and is in the position of every assignee of property subject to liens or charges. Had the bank bills in possession of appellants been instruments of a different character, had the time and place of payment been fixed, and had they lacked the ingredients of obligations which pass current by delivery merely, then the time of issue might be fixed with some reasonable degree of certainty But as the promise is to bearer on demand, the last holder, or the holder at the time of failure, can hold those stock. holders upon their statutory liability who are such when the bank refuses payment.

Angell & Ames, on Corp., § 534.

This reasoning is in accord with the doctrine announced

in Angell & Ames on Corporations, § 620, wherein it is said that where corporators are made personally responsible by charter for debts contracted "during the time they hold stock," those who are members at the date of a note given for a preëxisting debt, are liable, and not those who may have been liable when the original debt was contracted.

See Castleman *vs.* Holmes, 4 J. J. Marsh, 1.

II.

The liability, considered with reference to the right to sue for the unpaid subscriptions to the capital stock.

It is charged in the bill (Record, f. 8) that the right to sue for and recover the amount not paid to the bank upon each share of stock of the bank passed, by the terms of the assignment, to the assignees, Anderson & Mercer, but that said assignees had not exercised the right to sue for and recover the same.

This bill was filed before the decision of this Court, at the last term, in the case of Terry *vs.* Abraham *et al.*, 3 Otto, p. 40.

In that case this Court held that the assignment made by the Merchants' and Planters' Bank, which is, in its terms, very much like the assignment in the present case, did not carry with it the *statutory liability* to pay unpaid bills, etc.

But the Court did not decide that the balances due upon unpaid stock did not pass to the assignees although it intimated very strongly that they did not pass by the deed of assignment in evidence.

Be this as it may, the assignees made no effort to collect them before they filed their bill against the creditors and bill holders of the bank, to wit, on the 2d day of April, 1870. (Record f. 22, 11th interrogatory.)

If the right to sue for unpaid balances did not pass to the assignees, then these appellants are not in fault in not seeking the instructions of the Court as to their duty in the premises.

If the right to sue for such balances did pass to the assignees, then it was their duty to have exercised the power given them by the deed, and to execute their trusts without compelling the defendants, in the action which they had instituted for the purpose of ascertaining how the assets *in hand* should be administered, to proceed at law or in equity against them.

If the assignees failed to do their duty, then a Court of Equity will permit that to be done by means of this bill, brought for the benefit of all the bill holders, which ought to have been done—namely, the enforcement of the right to collect the unpaid subscriptions to the capital stock due from the corporators. The creditors cannot be deprived of this right, except by their own conduct or by reason of the bar imposed by the Statute of Limitations.

New Albany *vs.* Burke, 11 Wall., 96.
Burke *vs.* Smith, 16 Wall., 390.
Sawyer *vs.* Hoag, 17 Wall., 67.

It will not be contended that the appellants have either personally or through their agents or attorneys formally released the appellees from their share of this debt due by them. Nor can any waiver of their right to collect this debt be inferred from their conduct.

Nor is it contended that the appellees have been released from it by the corporation, or by the assignees of the corporation. The corporation could not, except for a valuable consideration, release the corporators from any portion of their indebtedness, so as to deprive the creditors of their means of obtaining payment of their debts.

This point was decided in the case of Slee *vs.* Bloom, 19 Johns., 456, wherein the Court held that no corporation could, by a by-law or resolution, release the unpaid subscription to the capital stock so as to deprive a creditor of his means of obtaining satisfaction of his debt.

The obligation to pay this debt when lawfully demanded is as great as the obligation to pay a promisory note at maturity. Failure to sue on non-payment of the note does not release the debtor, nor does failure to sue on non-payment of this debt release the stockholder.

If the failure be so long continued that the Statute of Limitations bars the creditor, he loses his debt, simply because the Courts will not afford him a remedy, and not because the debt is not still due and unpaid.

The appellants in this case did not call for payment of the unpaid subscriptions until the assets of the corporation in the hands of the assignees had been distributed, and it was manifest that a large sum was still due to the bill holders. When this fact was ascertained, suit was commenced to enforce it.

If this suit cannot be maintained, it is because the Statute has cut off the remedy, and not because the debtor has paid his just debts.

III.

This brings us to the consideration of the main question involved in this case—namely, whether appellants' right of action is barred by the Statute of Limitations of the State of Georgia.

This Statute has to be considered with reference, first, to the right to sue for unpaid subscriptions; and second, to the right to recover upon the *ultimate liability* clause of the charter of the bank.

The provisions of the Statute relied upon by the defendants are found in the following extracts from the Act of March 16, 1869:

SEC. 3. "That * * * all suits for the enforcement of rights accruing to individuals or corporations under the Statute or acts of incorporation, or in any way by operation of law, which accrued prior to 1st of June, 1865, not now barred, shall be brought by 1st of January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred."

* * * * * *

SEC. 6. "That all other actions upon contracts, express or implied, *or upon any debt or liability whatsoever, due the public or a corporation*, or a private individual or individuals, which

accrued prior to the 1st of June, 1865, and are not now barred, shall be brought by 1st of January, 1870, or both the right and the right of action to enforce it shall be forever barred.

All limitations hereinbefore expressed shall apply as well to Courts of Equity as Courts of Law, and the limitation shall take effect in all cases mentioned in this Act, whether the right of action had actually accrued prior to 1st June, 1865, or was then only inchoate and imperfect, if the contract or liability was then in existence."

* * * * * *

Sec. 8. "That all cases of the character mentioned in any section of this Act which have arisen, or in which the right of action or the liability have accrued, or the contract has been made since the 1st of June, 1865, shall be controlled and governed by the limitation laws as set forth in the Revised Code of Georgia, adopted by the new Constitution of this State."

Laws of Georgia, 1869, p. 133.

The right to sue for and recover the unpaid subscription to the capital stock of the corporation would be covered by section 6, above quoted, since such unpaid subscriptions are debts or liabilities due a corporation.

The right to sue for and recover the sums due from the stockholders under that clause of the bank's charter which makes them ultimately liable for the redemption of the bills or notes issued by or from the bank, would be covered by section 3 of the said Act, as such liability is a right accruing to individuals and corporations, under the statute or acts of incorporation.

It is important to ascertain whether, as a matter of fact, the right to bring actions for unpaid subscriptions and upon the ultimate liability clause of the charter accrued prior to June 1st, 1865.

The bill alleges (Record, f. 7), and the demurrers admit, that at the time of the failure of the bank, to wit: Feb. 20, 1865, the full amount of the capital stock of the bank had not been paid in by the stockholders; that the holders of a

very large amount of the stock had paid in, on account thereof, only eighty dollars on each share held by them, respectively, leaving a balance of twenty dollars due on each share.

The corporation, although insolvent, continued to transact some business between Feb. 20, 1865, and May 24, 1866, as is shown by the fact that between these dates it redeemed bills which had been issued by it to the amount of $207,448.

It was not until the latter date that the stockholders resolved to make an assignment for the benefit of its creditors.

Up to this time, at any rate, the bank was in possession of legal assets and no creditor could have maintained an action against a stockholder to recover the unpaid balance due on his subscription.

To any such action it would have been an ample defence to the stockholder to have said, the legal assets of the bank are not exhausted. When they are exhausted, and not before, a court of equity will assist you in reaching any unpaid balance which may be due from the stockholders.

The right to sue upon the liability clause of the charter rests on very much the same foundation.

The right to sue for this liability accrues only when the assets are exhausted and the Court can ascertain what amount of debts due by the bank remain unpaid.

And certainly no court of equity could permit a suit to be brought to enforce this liability when it was apparent that a large fund belonging to the bank was in the hands of assignees for the purpose of liquidating its debts.

In the case of Pollard *vs.* Bailey, 20 Wall., 520, this Court held that where the charter of the bank provided that individual stockholders having shares in the bank should be bound, respectively, for all debts of the bank in proportion to their stock holden therein, no direct action against the stockholders to pay the proportionate part of their indebtedness to the bank on their ultimate liability accrued until the assets of the bank were exhausted. And this for the reason that until the exhaustion of the assets in payment of the debts of the corporation, the stockholders' liability is not liquidated, and the total deficiency is not ascertained.

Having this principle to guide us in fixing the time when the liability of the stockholders in the Planters' Bank became liquidated by the ascertainment of the total deficiency due upon obligations of the bank, we find that such time was June 30, 1873, on which day the assignees Anderson and Mercer, had fully distributed all the property of the bank which had come into their possession. (Record, f. 11.)

It is unnecessary to discuss the question, whether so much of section 6 of the Act of March 16, 1869, quoted above—as provides that "all limitations hereinbefore expressed shall "apply as well to Courts of Equity as Courts of Law, *and the* "*limitation shall take effect in all cases mentioned in this Act,* "*whether the right of action had actually accrued prior to the* 1st "*of June,* 1865, *or was then only inchoate and imperfect, if the* "*contract or liability was then in existence*"—is constitutional or not, inasmuch as the Supreme Court of Georgia has decided that it conflicts with section 8 of the same Act; and that, under the provisions of section 8, all cases in which the right of action or the *liability has accrued* since June 1st, 1865, are to be controlled and governed by the limitation laws, as set forth in the revised Code of Georgia, adopted by the new Constitution of that State.

Black *vs.* Swanson, 49 Geo., 424.
McLaren *vs.* McCarthy, 53 Geo., 42.

The Code of Georgia, adopted by the new Constitution of that State, is Irwin's.

That code provides, among other things, as follows:

§ 2865. All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues.

* * * * * *

§ 2872. All other actions upon contracts, express or implied, not herein provided for must be brought within four years from the accrual of the rihgt of action.

It is evident that if the reasoning in Pollard against Bailey is to be followed in this case, then the appellants are not barred by the Statute of Limitation, so far as the ultimate

liability of the stockholders is concerned. The earliest day at which the total deficiency of the bank could be accurately determined would have been June 30, 1873, or, if not upon that day, then on the day when the assignees filed their bill against the creditors for instructions as to the distribution of the moneys of the bank in their hands. This day was April 2d, 1870. (Record, f. 22, 11th interrogatory).

It was on one of these two dates that the liability of the stockholders accrued. Whichever date is held as the correct one, appellants had twenty years therefrom in which to commence their action, as they were sueing upon a *statutory liability*.

See Thornton *vs.* Lane, 11 Geo., 461.

If the unpaid subscriptions to the capital stock passed to the assignees of the bank, as alleged in the bill, then appellants had no right of action to recover them from the stockholders so long as the assignees were in office. When they had been discharged and had failed to execute their trust, then the appellant's right became absolute and they could have brought the action at any time before June 30, 1877, without being barred by the statute.

If the Court shall be of opinion that these unpaid subscriptions did not pass to the assignees, but that any creditor had the right to compel their payment by a proper action, then it is admitted that the statue does bar the action, so far as this branch of the case is concerned, in view of the pleadings before the Court.

The fact that the charter says that the stockholder shall be ultimately liable for the redemption of the bills "in the same manner as in ordinary commercial cases or in simple cases of debt," does not affect the merits of this case. Even if the Court should hold that an action of assumpsit or debt would lie to recover the proportion due from the stockholder, this fact does not preclude a Court of Equity from sustaining a bill against all the stockholders for the benefit of the bill holders generally.

An action like this calls especially for the exercise of

equitable remedies, inasmuch as contribution to a common fund is required from many persons occupying similar relations to each other, and all indebted to the same class of creditors. In such an action multiplicity of suits is avoided.

An ordinary commercial case, in which such relief is sought as is sought by this bill, would properly be within the jurisdiction of a Court of Equity. The commercial cases which it most nearly resembles are cases of general average and cases for settling affairs of a partnership.

IV.

The remaining question is as to the right of Mr. Terry to recover against the stockholders on account of the $1,464 in bills, on which he has received no dividend, and which were not presented to the assignees for liquidation until June 25, 1873, on which day they were presented to Thomas H. Harden, business agent of the assignees, for payment and redemption. (Record, f. 12).

Payment was refused. No objection is made that the bills are not genuine obligations of the bank, and so far as the record shows they are to be so regarded.

If no right of action upon the liability clause of the charter of the bank accrued in favor of the bill holders until the assets were all distributed, then there is no reason why Mr. Terry should be deprived of his remedy upon these bills. The fact that no judgment at law against the bank upon these bills has been had, does not deprive him of his rights, if the record shows that the bank is insolvent, and all its assets are exhausted.

If it be said that the stockholders are in the position of sureties, and that the Act of March 16, 1869, had barred plaintiff's right of action against the principal, before demand for payment was made, then the Court must determine whether that act is constitutional or not. If it shall hold that the act is constitutional, and that it allowed a reasonable time after its passage in which to bring action,

then it is conceded that as to these bills Mr. Terry cannot recover against the stockholders. The authorities upon this constitutional question are fully presented in the brief in this case prepared by Mr. Terry.

But as to the other bills, as to which judgments were rendered in the case of Anderson and Mercer against McNish and others, the bank, by its agents, and by paying a dividend thereon, has acknowledged their validity since January 1, 1870, and it was only when the principal was unable to make further payments that the debt from the stockholders to the bill holders became liquidated, and the bill holders right to sue the stockholders accrued.

WILLIAM STONE,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1876. No 266

HARVEY TERRY and J. and T. GREEN,
Appellants,

vs.

EDWARD C. ANDERSON *et al.*,
Appellees.

Oct Term 1877

Appeal from the Circuit Court of the United States from the Southern District of Georgia.

APPELLANTS' BRIEF.

No 39.

ARGUMENT FOR HARVEY TERRY.

R. O. POLKINHORN, Printer, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1876.

HARVEY TERRY and J. and T. GREEN,
Appellants,
vs.
EDWARD C. ANDERSON *et al.*,
Appellees.

Appeal from the Circuit Court of the United States from the Southern District of Georgia.

Appellants' Brief. No 39.

ARGUMENT FOR HARVEY TERRY.

Statement.

The Planters' Bank, a body corporate, under the statutes of the State of Georgia, located at Savannah, Georgia, "by reason of losses arising from circumstances incident to the late war, being unable to pay its just and legal debts," by its stockholders resolved, "that the property and assets of said corporation be assigned to some fit and proper person, to be selected by the board of directors, for the benefit of the creditors of said corporation." (Resolutions of stockholders' meeting, May 24, 1866.)

The Directors subsequently resolved, that the President be, and he is hereby directed, to execute and make an assignment of all the property of said corporation

for the use and benefit of the creditors of said bank. (Folio 5.) Thereupon the President and Cashier of said Planters' Bank executed an assignment, conveying to G. W. Anderson and H. W. Mercer certain of the assets of said bank, according to the schedule made by the officers of said bank, and delivered with the said assignment, for the purpose of the equal distribution of the assets of said bank so assigned, among the creditors and bill holders according to law; and the said G. W. Anderson and H. W. Mercer duly accepted the said trust of assignment, and entered upon their duties July 9, 1866, and continued until June 30, 1873, until finally discharged from their trusts under said assignment by the court. (Folios 10 and 11.)

That the assignees published a notice for all bill holders having claims against said bank to present the same for payment to said assignees. (Folio 6.)

That in obedience to said notice, appellants presented to and lodged with said assignees for liquidation certain of the bank bills or notes issued by said bank, as shown on his complaint (folios 9 and 10,) in the year 1869 to the amount of $6,722, and his co-complainants deposited in the year 1869 as aforesaid $5,791. And appellants had no means of knowing the amount and value of the assets assigned nor of the liabilities of said bank during the period which intervened between the times when they deposited their bills with the assignees for liquidation, and the 1st day of January, 1870, and appellants had hoped that the assets of said bank would pay their bills in full.

That afterwards—subsequent to the year 1870—Harvey Terry, appellant, deposited a further sum of $1,117 of the bills of said bank with said assignees for payment.

That afterwards the said assignees caused to be filed in the Superior Court of Chatham county, Georgia, a bill in equity entitled G. W. Anderson and H. W. Mer-

cer, assignees, &c., complainants, *vs.* T. J. McNish and others, defendants; to which said bill said assignees were complainants, and appellants, by publication, together with other creditors of the bank, were made defendants.

The said Superior Court of Chatham county, on July 14, 1871, proceeded to adjudicate upon the rights of the several parties to said bill; and said court found and decreed that there was due to your appellants the several sums of money as charged in the complainant's bill, (folios 8 and 9.) And the said court further decreed that the said assignees should pay the balance of the assets of said bank in their hands to all the creditors named in said decree equally *pro rata* on all the claims allowed.

That on the 30th day of June, 1873, a final decree of distribution, declaring and distributing a dividend of 30⅛ per cent. to bill-holders, was made by the court, and a final order, discharging said assignees from their trust under the deed of assignment, was made. (Folio 11.)

That on the 25th day of June, 1873, Harvey Terry, appellant, presented $1,464 of the bank bills of said Planters' Bank to Thomas H. Harden, business agent of said bank, and the business and acting agent of said assignees, and demanded payment of the bills; but any payment and redemption thereof was refused. (Folios 12, 13.)

That the stockholders of said Planters' Bank were made liable, under the charter, for the ultimate redemption of all the bills and notes issued, as shown by section 3 of the act to extend the charter of said Planters' Bank, approved December 23, 1836. Princess' Digest, Laws of Georgia, 132, and reads as follows:

"The persons and property of the stockholders for the time being, in said Planters' Bank, shall be pledged and bound, in proportion to the amount of the shares that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by

or from said bank, during the time he, she, or they may hold such stock, in the same manner as in ordinary commercial cases or simple cases of debt."

That, by rule 15, "the corporation shall exist and continue * * * after the expiration of its charter until the concerns and claims of the said bank are finally settled and wound up, so as to enable the said bank to appear as plaintiff or defendant, and to obtain, by suit or otherwise, a settlement and liquidation of its outstanding demands, and in no ways to acquire new property or profits by discount or otherwise." Princes' Dig., Laws of Georgia, 60, 61.

That the final decree of distribution of the assets of said bank was made and the assignees discharged from their trust June 30, 1873. Whereupon the ultimate liability of the stockholders of said Planters' Bank accrued to pay the proportionate part of the debts of said bank. And all efforts to amicably arrange for the payment of said ultimate liability of said stockholders having failed, appellants filed their bill in this cause April 6, 1874—nine months and seven days after the ultimate liability of said stockholders to pay the remaining debts of said bank had attached. (Folios 11 and 35.)

That Complainant's bill, filed April 6, 1874, charges: that said stockholders, defendants, owe twenty dollars per share, unpaid capital stock of said bank, upon each and every share held by them respectively; and that said unpaid capital was not assigned, and did not pass by the said assignment of said bank, to said assignees (as shown by schedule A thereto attached—folio 8) and that said unpaid capital was not administered upon, and was not converted to the use of the creditors of said bank by said assignees; but that the same remains now in the hands of said stockholders, as a trust fund belonging to said bank, and subject to this action of the creditors of said bank, for the payment thereof; and that said defendant

stockholders are also liable to pay each their proportionate part of the ultimate liability, for the payment of the debts of the bank remaining unpaid after the assets of the corporation are exhausted; and that the assets of the bank in hand have been exhausted and applied, and thereupon the ultimate liability of the said defendants to pay the debts of said bank, accrued and became due, and this action was brought to enforce payment thereof.

The defendants demurred to said Bill of Complaint, and for cause of demurrer allege, that the several causes of action in the said bill set forth, if any, existed before June 1, 1865, yet said bill was not filed until April 6, 1874, after January 1, 1870.

And for further cause of demurrer, by which Complainants seek to recover any sums of money as unpaid subscription for stock in the said bank, the defendants show that complainants were all defendants to a bill filed by Geo. W. Anderson and H. W. Mercer, assignees of the said bank, for the payment of and distribution of the assets assigned to the creditors of the bank; said bill was filed against complainants in this suit, and other creditors of the bank, for instruction as to the distribution of such assets assigned; and final winding up of the affairs of said bank, in pursuance of the said assignments In which said suit a final decree was rendered by the said Superior Court, distributing the said assets and discharging the said assignees, and that they, the said complainants, participated in said distribution. Yet the said Complainants allege no excuse or reason for not seeking the aid of that court, as it was competent for them to do, to require the said assignee to collect the assets now sued for, if any such there were, or why the said decree should not be binding and conclusive upon them, as a final settlement of the affairs of said bank.

And for cause of demurrer to that much and parts of the said bill, whereby said Complainants seek to recover

from defendants the amounts of their alleged proportionate liability as stockholders in the said bank, for the bills of the bank, held by the said complainants under the third sections of the acts of 1836 and 1859 extending the charter of the said bank; the said defendant shows that the substance of the third section is alleged in the said bill, whereby it appears that the said alleged liability is for the ultimate redemption of the bills issued from said bank during the time defendants held stock; yet the said complainants have not alleged that defendants held any stock in said bank when any of their said bills were executed.

And for a cause of demurrer to those parts of said bill whereby said Harvey Terry seeks to recover against defendants by reasons of certain bills of said bank amounting to $1,464, defendants show that the said bill does not set forth whether he became the holder of said bills before or after the aforesaid final decree of the Superior Court, or why they were not presented by the said Terry for participation in the distribution of the assets directed thereby.

Demurrer sustained by the Circuit Court. Upon hearing argument upon the demurrer, filed in the above entitled cause, it is ordered that the said demurrer be sustained, and complainant declining to amend their bill, it is further ordered that the same be dismissed with costs.

A copy of the Act of the General Assembly of Georgia referred to.

"An Act in relation to the Statute of Limitations, and for other purposes."

"Whereas, such confusion has grown out of the distracted condition of affairs during the late war; and whereas doubts are entertained relative to the law of limitation of accounts in this State, which should be put to rest."

"SEC. 1. *Be it therefoe enacted* by the General Assembly of Georgia, that all acts of the Legislature of this State, and all ordinances of the conventions of 1865 and 1868, which have the force and effect of law, which are retroactive in their character relative to the Statute of Limitation, shall be held by the courts of this State to be held null and void in all cases in which the statute had fully run before the passage of said retroactive legislation.

"SEC. 2. *And be it further enacted*, That all suits upon judgments obtained outside of this State prior to June 1st, 1865, not now barred, and all writs of *scire facias* to revive any judgment obtained in this State, which is now dormant, shall be brought by 1st January, 1870, or both the right of action and the remedy shall be forever barred.

"SEC. 3. *And be it further enacted*, That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights according to individuals, or corporations, under the statute or acts of incorporation, or in any way by the operation of law which accrued prior to 1st of June, 1865, not now barred, shall be brought by 1st of January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred.

"SEC. 4. *And be it further enacted*, That all actions on promissory notes, bills of exchange, or other simple contracts in writing, and all actions on open accounts, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, which accrued on a contract which was made prior to June 1st, 1865, not now barred, shall be brought by 1st January next, after the passage of this act, or the right of the party, plaintiff, or claimant, and all right of action for its enforcement shall be forever barred.

"SEC. 5. *And be it further enacted*, That all actions against executors, administrators, guardians, or trustees, which occured prior to 1st of June, 1865, or which are predicated upon any alleged neglect or misconduct of any such executor, administrator, guardian or trustee, in the investment of trust funds in currency, bonds or the like, without any order of court or other sufficient authority, or in the management of any trust estate, which occurred prior to the 1st of June, 1865; or when the management or investment was made prior to that date, shall be brought by 1st January, 1870, if not already barred, and not after, and the right of action shall be forever barred, if not brought within that time; *Provided*, That no executor, administrator, guardian or trustee shall have the benefit of this act who has acted fraudulently and corruptly in the management of the trust estate.

"SEC. 6. *And be it further enacted*, That all other actions upon contracts, expressed or implied, or upon any debt or liability whatsoever, due the public, or a corporation or a private individual, or individuals, which accrued prior to the 1st of June, 1865, and are not now barred, shall be brought by 1st January, 1870, or both the right and the right of action to enforce it shall be forever barred.

"All limitations hereinbefore expressed shall apply as well to Courts of Equity as Courts of Law, and the limitation shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to the 1st of June, 1865, or was then only *inchoate* and imperfect, if the contract or liability was then in existence.

SEC. 7. *And be it further enacted*, That all actions for torts of any character whatever, when tort or wrong was committed, or the right of action accrued, or the injury was done, whether to the person or the property of any person or corporation, prior to the 1st of June, 1865, by

any person then or now a citizen or inhabitant of this State, which is not now barred, shall be brought and prosecuted within three months from the passage of this act, or the right of action of the injured party or plaintiff in the action, as well as the right of such party to sue, shall be forever extinguished, barred, and foreclosed.

SEC. 8. *And be it further enacted*, That all cases of the character mentioned in any section of this act which have arisen, or in which the right of action or the liability has accrued, or the contract has been made since the 1st of June, 1865, shall be controlled and governed by the limitation laws as set forth in the revised Code of Georgia, adopted by the new constitution of this State.

SECTION 9. Repeals conflicting laws.

Approved March 16, 1869.

Assignment of Error.

1. That the Circuit Court of the United States for the Southern District of Georgia, erred in its judgment, in holding that the act of the General Assembly of the State of Georgia, approved March 16, 1869, entitled "An act in relation to the statute of limitations and for other purposes" was a bar to said suit, and that said act was a valid and constitutional act.

2. That under the constitution and laws of Georgia, as they existed at the date of the issue of the bills, vouchers of the debt sued on, and as said constitution and laws of Georgia existed at the time of the alleged failure of the bank, the complainant's right of action would not be barred before the expiration of twenty years.

That complainant's right of action in this cause did not come within the purview of the act of March 16, 1869, and the court erred in holding that complainant's right of action accrued to them and existed before they

came in possession of the bills sued on; and that complainant's right of action existed before the assignment of the bank, and that the right of action existed before demand of the payment of the bills sued on had been made, and before the ultimate liability had been determined.

3. That complainant's suit is founded on the statute of incorporation of said Planters' Bank; that said charter is not repealed, amended, or abrogated, by the subsequent enactment by the General Assembly of Georgia by the act of March 16, 1869, and that said act is unconstitutional and void as a bar to said suit.

That the defendants' demurrer having plead that complainant's right of action attached before the 1st day of June, 1865, it was error in the court to hold that complainant's bill was barred by said act of March 16, 1869, and that said subsequent legislation by said State, did impair and did bar the vested rights in said suit already attached under said charter, before the passage of the act.

Statement of Facts.

I.

That said Planters' Bank, of Savannah, Georgia, did not commit any Act of Bankruptcy or legal failure until making of assignment July 9, 1866, and the bank bills deposited in the hands of the assignees for *pro rata* dividend out of the assets of said bank were all issued prior to the year 1865, paid out at a specie value, payable to the bearer on demand, and circulated as money, and intended to be used and circulated as money, during the existence of said bank charter, (until the year 1881,) unless the same should be presented and payment demanded at an earlier date. That in pursuance of said assignment, and notice given by said assignees for all holders of the bank bills of said bank to come forward

and prove their claims, the complainants, Harvey Terry, and J. and T. Green, in December, 1869, filed their bank notes with, and made demand of payment from said assignees, on their bank notes amounting to $11,396; and subsequently Harvey Terry filed with said assignees $1,117, of said bank notes additional; in proof of claim against said bank, and final decree of judgment thereon, and therefor was rendered in favor of complainants June 30, 1873. (Record, folios 9 and 10.) That previous to the final decree of judgment in the cause of G. W. Anderson and H. W. Mercer, assignees, vs. T. J. McNish *et al.*, and previous to the discharge of said assignees from said trust, Harvey Terry made demand of payment of $1,464 of said bank notes vouchers in this action (folios 12 and 13) from said assignees, and from Thos. H. Harden, Esq., as the acting agent and business man of said assignees and Planters' Bank, to wit, on June 25th, 1873; and payment refused and protest of said bank notes noted on that day. (Folio 13.)

II.

That certain stay laws of Georgia were enacted Nov. 30, 1860, by the General Assembly; see Laws of Georgia 1860, page 21, No. 8, "An Act to grant relief to the banks and people of this State, * * * * and to suspend the pains and penalties imposed on the several banks, * * * * for nonpayment of specie, and for other purposes, &c.," and existed until Dec. 1, 1861.

Stay law re-enacted Nov. 30, 1861. Laws of Georgia, 1861, page 18, No. 6. To be of force until Dec. 1, 1862.

An Act to grant relief to the banks and people of this State. Laws of Georgia, 1862, page —, No. 10. Assented to Nov. 29, 1862; and re-enacted Georgia Laws, 1863–4, page 13; and re-enacted Laws of Georgia, 1864, page 45, to be of force during the war.

This last Act is followed by Act of Dec. 12, 1866.

Laws of Georgia, 1866, page 157, No. 224. No levy or sale of any property on any contract, or liability made prior to June 1, 1865, until January 1, 1868, then the execution to be for only one-third yearly until paid. These stay laws have been judicially decided by the courts of Georgia to have continued until July 21, 1868.

49 Georgia, 431, Addison *vs.* Christy.
55 " 275, Bell *vs.* Hanks.

The code of Georgia in existence at the date of the assignment of said Planters' Bank, prescribes the proper method and form of administering upon the estate of an insolvent bank. See Code of Georgia, 1861, Art. 3, p. 279. When the Governor is informed of the insolvency of a bank, his duty is to notify the Attorney General to file his bill of information, and appoint a receiver of the corporation to collect and reduce the assets to cash; then pay the creditors pro rata from the fund until exhausted; and the corporation being found insolvent, the receiver is authorized to bring suit against the stockholders for the deficiency of the debts of the corporation remaining unpaid. This was the statute law of Georgia in existence at the date of the failure of said bank, and ought to determine what constitutes the ultimate liability of the stockholder; and said statute ought to determine the date at which said ultimate liability accrues, to wit, at the date when the corporate assets are exhausted.

III.

That the final accounting of the assigned assets of said Planters' Bank by the assignees was made June 30, 1873, and the protest of the bills and vouchers in this cause was made June 25, 1873; and complainants claim that their rights of action against said stockholders accrued at those dates, (folios 10, 11,) and did not arise before June 1, 1865; and that complainants filed their bill in this action within nine months and seven days after the right

of action accrued to them, to wit, April 6. 1874. And if this court holds the Act of the General Assembly of Georgia, dated March 16, 1869, to be a valid and constitutional act as to limitations within its purview, then complainants submit that they labored under disability to bring suit against these defendants until June 30, 1873, (until final decree discharging the assignees,) and ought to be allowed the full time of nine months and fifteen days, allowed by said act, wherein to bring this action; and therefore they are not within the purview of said act of limitations.

IV.

The Code of Georgia in existence at the date of the alleged failure of said Bank contains the following sections. Code of Georgia, 1861, § 1440:

Stockholders—when sueable.

If the assets of the Bank are insufficient to pay all of its liabilities, the receiver shall bring suit in his own name for their unpaid stock to an amount which will be their proportion for the liquidation of all the debts, and on his failure to do so, any creditor may use his name for that purpose.

§ 2857. All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues.

§ 2741. Bills, notes, or other paper payable on demand are due immediately. When no time is specified for the payment of a bill or order, it is due as soon as presented and accepted.

The following provisions of the Code of Georgia, 1867, were in existence, as the statute law of the State, at the

date of the passage of the act of March 16, 1869, are hereto set out and referred to:

§ 1673. A banking corporation is a private corporation.

§ 1677. Corporations have continuous succession during the time limited by their charter, notwithstanding the death of all of their members.

§ 1682. Private corporations heretofore created without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution by the will of the State.

§ 1688. The dissolution of a corporation, from any cause, shall not in any manner affect any collateral or ultimate, or other liability legally incurred by any of its officers or members.

§ 2865. All suits for the enforcement of rights accruing to individuals under statues, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues.

Preliminary Provisions—Code, 1867. p. 4. § 6.

"Laws prescribed only for the future, they cannot impair the obligation of contracts, nor generally have a retrospective operation. Laws looking only to the remedy may apply to contracts, rights and offences entered into, or committed prior to their passage; but in every case a reasonable time subsequent to the passage of the statute should be allowed for the citizen to enforce his contract, or to protect his right."

§ 2597. The *bona fide* purchaser of negotiable paper not dishonored, or of money, or bank bills or other recognized currency, will be protected in his title, though the seller had none.

The following sections of the Constitution of Georgia, adopted July, 1868, and were in force at the date of the passage of the Act of March 16, 1869. Art. I. Sec. 26: "Laws shall have a general operation, and no general law, affecting private rights, shall be varied, in any particular case, by special legislation, except with the free consent, in writing, of all persons to be affected thereby; * * * * * § 32." "Legislative Acts in violation of this Constitution, or the Constitution of the United States are void, and the judiciary shall so declare them."

Art. XI. § 4. "Local and private acts passed for the benefit of Counties, Cities, Towns, Corporations, and private persons, not inconsistent with the supreme law, nor with this constitution, and which have not expired nor been repealed, shall have the force of statute law, subject to judicial decision as to their validity when passed, and to any limitations imposed by their own terms."

Art. III. § 6. Par. III. "No law or section of the Code shall be amended or repealed by mere reference to its title, or to the number of the section in the Code, but the amending or repealing act shall distinctly and fully describe the law to be amended or repealed, as well as the alteration to be made; * * * * * * * * *."

Complainants bill was filed April 6, 1874, and alleges that the bank bills sued were issued and circulated while the defendants held their shares of stock, alleged (folio 59), and the allegations in the bill are not denied, but they stand admitted to be true by the demurrer in the cause; but the defendants contend that complainants are barred by the act of March 16, 1869. Defendants also contend that complainants are estopped from bringing suit for the unpaid stock because complainants were made parties to the suit of the assignees against the parties who proved their claims against the bank. Said

suit by said assignees was not a suit of the corporation against the bill-holders, but it was a suit of trustees to determine the final execution of their trust, and the due application of the assets of the bank to the creditors. Plaintiff submits the fact to be, that the unpaid capital stock sued for was not assigned by said bank in said assignment, and did not pass to said assignees, and was not administered upon, nor appropriated towards the payment of the creditors of said bank, and therefore it is not *res adjudicata*, and cannot be plead as a bar to this action, because it was not a contest in that action, nor between the parties necessary to determine that issue. That said assignees had no right, power, or authority, to sue for, collect, and appropriate any property or assets not embraced in the deed of assignment. This asset of the bank does not appear in the said deed, and was not considered within the purview of said deed, and it was not known to the complainants herein that said unpaid fund existed.

Complainants assign as error the ruling of the Circuit Court, holding and maintaining that the act of March 16, 1869, is a valid and constitutional law, and deny that complainants right of action is within the purview of said act; have shown by their pleadings that suit was brought April 6, 1874, and that the ultimate liability of said defendants did not arise until July 30, 1873, and upon the unpaid bills, vouchers in this action, protest thereof was made June 25, 1873, and suit upon the claims of complainants was brought within nine months and fifteen days after the right of action arose against the defendants, and therefore complainants are not within the purview of the Act of March 16, 1869, if said act should be held to be a valid law.

That said Act of March 16, 1869, as plead in this cause, if applied as plead, takes away a right of action from complainants that existed for twenty years as a vested

right, at the date of the issue of the bills, vouchers of the debt sued on, and existed for twenty years as a vested right at the date of the alleged failure of the bank, and gave a defence to the defendants that did not exist at the date of the issue of the bills, vouchers of the debt in this action, and gave a defence that did not exist at the date of the alleged failure of said bank, and complainants plead the unconstitutionality of said act as a bar to this action. That said act was retroactive and retrospective in its operations, and was intended to affect, and did affect, the rights of contract and the rights of action then in existence at the date of its passage only; and did not affect, and was not intended to affect the rights of contract or the rights of action accruing after the passage of said act, and was not intended to bar the rights of any contract, or the rights to any action made, or that accrued after its passage. Said act being retrospective and retroactive only, and not prospective, nor operative upon future contracts or rights of action thereafter to be made and barred without day, inchoate rights if the contract or liability existed at the date of its passage, and accrued after January 1, 1870. That the 3d and 4th sections of said act bars actions where merely the contract was made prior to June 1, 1865, although the action had not at that time accrued, and may not have accrued until the action was barred January 1, 1870.

The 5th section of the same act carrying out the same view in relation to guardians, trustees, and personal representatives, provides—that when the management or investment was made prior to June 1, 1865, although the cause of action may not have accrued before January 1, 1870, yet the action shall be barred at that date. This is the only legitimate construction that can be placed upon these several sections, and what is lacking in the first five sections, to carry out this view, is supplied in

the sixth section, which specifically refers to, and embraces the preceeding five sections, and provides—"that in all cases recited in the previous sections, the causes of action shall be barred, unless brought by January 1, 1870, if the *contract* or *liability* was in existence on the 1st day of June, 1865;" that is to say, if the contract was made prior to June 1, 1865, or that the liability was outstanding before June 1, 1865.

Plaintiff submits that the first seven sections of said act, are repugnant to section eight or the last part of said statute; and if the latter part of said statute is repugnant to the former part thereof, the latter part shall stand, and so far as it is repugnant—the last section of the act—it ought to be a repeal of the former part of the act, because it was the last agreed to by the makers of the statute. Bacon Abrig. Tit. Stat. (I.) 2. Key to the intentions of its makers and latter intentions of the legislators. Fitzgib. 195. Att. Gen. vs. Gov. of the Chel. W. W.

The new code of Georgia adopted by the eighth section of said act of March 16, 1869, for all rights of action arising after June 1, 1865, gives complainants a vested right of action for twenty years, and says expressly 'in which the right of action of the liability has accrued or the contract of liability has been made since June 1, 1865, shall be controlled and governed by the limitation laws as set forth in the revised code adopted by the new constitution of this State." This last section eight being the last part of said act made by its makers, and being found repugnant to the first six sections of said act, the last section should stand as a valid act, and the first six sections be considered as repealed thereby. (See Code of Georgia, 1867, § 1688.)

That it would be inequitable and unjust to give the right of action to a person for twenty years whose right

accrued on the 2d day of June, 1865, and to limit a right or action to January 1, 1870, which accrued on May 30, 1865—just three days previously—and whose right of action was hampered and obstructed by stay laws until July 21, 1868, giving the right of action in one case a period of twenty years, and giving in the other case a period of less than eighteen months' limitation. This construction of the act, as contended for by the defendants in this suit, is unreasonable, unjust, and unconstitutional. But the recitals in the enacting clause may give us some insight into the meaning and true intent of its makers. The enacting clause says: "*Whereas such confusion has grown out of the distracted condition of affairs during the late war, and whereas doubts are entertained relative to the law of limitations of accounts in this State, which should be put to rest.*" Now if this act is truly represented in its preamble, then the true purport of the act and to what it relates is shown. It only relates to accounts and common law obligations, and has no application to statutory rights, as plead; nor has no application to rights of action arising by operation of law; and the act plead is void as a bar to complainants' bill.

Conclusions of Law.

The complainants' right of action in this suit is founded on the statutory liability of the charter requiring the stockholders to pay the debts and contracts of said bank and whatever balance may be found due them in order to redeem in full the debts of said bank sued on, and to pay the unpaid subscription to the capital stock remaining unpaid at the date of this action.

The evidence of the indebtedness of the bank to the complainants in this action is founded upon the issues of the bank, vouchers in proof in this action, and vouchers

surrendered to the assignees, upon which judgments have been decreed by a court of competent jurisdiction, and the records thereof filed in evidence in this cause.

The bank bills, vouchers in this action, were presented to the assignees June 25, 1873, and payment thereof demanded before the final discharge of said assignees from their trust; but payment was refused, and this action was brought within nine months and seven days after the final discharge of said assignees.

These vouchers filed in the cause show the indebtedness of the bank, and it is the statute of charter and the user of the franchise that show the indebtedness of the stockholders. Under the common law, no right of action exists against the stockholders. The liability of the stockholders is repugnant to the law of corporations. (Angel & Ames on Corporations, § 595–6.) And it is on the statute, and on this special statute alone, strictly construed, that the right of action is claimed against the defendants.

The facts set out in the complainant's bill are not denied. The charter of the bank, the organization of the corporation, the user of the franchise as charged, the issue and circulation of the bills, and the indebtedness of the bank are established. The demurrer of the defendants virtually admits all of the allegations of the bill. The demurrer relies upon the act of March 16, 1869, as a statute of limitations in bar of complainant's bill.

The complainants found their action upon the statute of incorporation, and the fact, that the corporation has been exhausted, the assets of the bank have been applied to the payment of its debts, and the claims sued on are outstanding debts of the bank, termed the ultimate liability of the stockholder under the statute.

Complainants show that the assigned assets of the bank were all distributed and the assignees dis-

charged from their trust June 30, 1873; when the ultimate liability of said stockholders accrued.

Code 1867, § 1497; Angel & Ames on Corporations, § 613, 624, 629.
8 Geo., 477; Lane *vs.* Morris.
11 Geo., 515–9; Thornton *vs.* Lane.
20 Wallace, 520; Pollard *vs.* Bailey.
16 Georgia, 225–32; Lane *vs.* Harris.
45 Georgia, 478; Hobbs *vs.* Cody.

And complainants' bill was filed April 6, 1874, and complainants allege this fact why they are not within the purview of the act of March 16, 1869.

Complainants also assign as error the constitutionality of the act of March 16, 1869.

At the date of the passage of the said act complainants had a vested right of action that existed for twenty years after the right of action accrued; and said right of action existed for twenty years at the date of the failure of the bank. Code 1861, § § 1440, 2857, 2741, 30 Geo., 774,–5.

And the demurrer, if allowed, and the act sustained as plead, then it took away from complainants a right of action that existed for twenty years after the default of the bank, and after the ultimate had liability accrued against the defendants, and gave to the defendants a defense that did not exist at the date of the issue of the bills sued on, nor did not exist at the date of the failure of the bank.

The consideration of statutes of limitations has been always based upon the idea that they are not retroactive nor retrospective, and are so held in the Code, 1867, page 4, § 6, *pre pro*, and are considered as applying only to rights of action which are to commence in *future*, there-

fore they are not considered as impairing vested rights or the obligation of contracts.

Angel on Limitations, § 22.

This being the status of this legal question, the converse is also true, that if a statute is retroactive—to wit, if it includes in its operation contracts created before its passage, then it impairs the obligation of contracts, and destroys vested rights and is in violation of the constitution of the United States. Art. 1, sec. 10.

As no disability of the plaintiff can intervene to help him by suspending the running of the statute after it has begun running; so also should no statute intervene to cut short the period of limitation after it has commenced running. So that in the case at bar, if the statute commence running against the stockholders in February, 1865, it commenced running before the act of March, 1869, was passed, and therefore should not affect the cause of action in this suit.

Angel on Limitations, § 196,–7.
2 Parsons on Cont., 374, sec. VII.
4 Maryland, 366,–7; Young *vs.* Mackall.
9 Ohio, 32; Coventon *vs.* Atherton.
8 Georgia, 5; Rendegost *vs.* Foley.

J. Johnson denies the right of a statute to destroy the operation of a limitation act after it has vested a title.

14 Howard, 503,–4; Webster *vs.* Cooper.
1 Wilson Works, 460; English Lectures.
2 Dallas, 307,–9; Van Lessee *vs.* Dorrance, 410.
11 Georgia, 262,–3,–4; Scott *vs.* Haddock.

This view of the law of limitation is fully sustained in Sohn *vs.* Waterson, 17 Wallace, page 599. That by the acts of the defendants, in the user of the franchise granted, the corporation was created; an estate upon condition was made and circulated as a thing of value,

and a trust by the defendant was accepted and assumed, (Code 1867, § 2313;) and this estate so created is the subject matter of this action.

This right to issue said bank bills and create said estate on condition did not exist at common law; it was a violation of the code for any person to issue bills to circulate as money without the legislative authority. Said bank notes did not exist by virtue of any contract between the stockholders and the bill holders. No contract in form or in substance existed as between these parties. But the statute prescribed the form of the bank bill, and prescribed the amount of the estate or circulation that could be legally created and circulated. It was the statute, and by virtue of the statute alone, that the bank bills vouchers in this suit have a legal existence, and it is under the statute, and not by virtue of any contract that the bank bills were circulated, and the estate upon condition was created, and it is under the statute and by virtue of the statute alone that the defendants in this action, upon condition broken, are liable for the payment of the debts of the bank, in proportion to the amount of shares held by each respectively, and for the ultimate redemption of the bills or notes issued by or from said bank.

It is not contended by the defendants that this franchise of charter was illegal or void, or that it has been annulled, abrogated or judicially determined, and said corporation, by its own terms, exists until 1881. (Code 1867, § 1677; Record, folio 3.)

When the stockholders accepted the charter, and by the user of the franchise created the estate upon condition, they were bound by the terms thereof under the statute.

3 Comyns' Dig. Tit. Condition,* 136 R.
53 Georgia, 502; Dobbins *vs.* Sibley.
1 Shars. Blackstone Bk. 2, page 299, Note 5.

The statute made a condition—that condition was that said stockholders assumed the ultimate payment of the debts of the bank, for the bills or notes issued from said bank, in proportion to the number of shares held by said stockholder. The ultimate redemption of the bills or notes issued by the bank is the requirement of the statute.

This is not the promise or contract of the stockholder to the bill holder; it is the statutory requirement of the franchise upon condition broken. It is the terms of the statute upon which the bill issued. It is the grant of the sovereign will upon condition. In the eye of the law the corporation is the active operating principal, the maker and creator of the estate upon condition. The stockholder is the indemnity to secure the payment of the bill. The stockholder was the pledgor; he had given his authority and direction to his agents to create the estate upon condition; he had pledged his person and property in trust (*quasi contractus*,) that upon condition broken by said corporation they would assume and pay the deficiency of the debts of the corporation, or the proportionate part of the debts of the corporation found due after the assets were exhausted.

The stockholders as the passive indemnity, security, pledgors, or guarantors, of the payment of the debts and contracts of the bank upon condition broken, were not bound to pay any debt or contract of said bank until the condition was broken, and the amount of the ultimate liabilities of the stockholders was legally ascertained. If no default in the condition occurred, no liability accrued. If default occurred, then the estate of the principal must be exhausted to ascertain the ultimate liability of the guarantor.

Pollard *vs.* Bailey, 20 Wallace, 520.

This is the common sense terms of the statute. It is the

statute and the use of the franchise by the defendants that constituted the act and made the liability valid.

It was the condition broken that created the debt, and the administration of the estate of the bank determined the ultimate liability of the defendants.

3 Comyn's Dig. Debt. (A. 1.) * 381, also * 89, A. 3.

1 Comyn's Action upon Stat. (A. 1.) * 434, action lies by the party grieved.

Where the law raises the promise, it is not within the statute of frauds, and not in writing; the law raises the promise to pay the debt of another.

9 Mass., 513. Goodwyn *vs.* Gibbert.

And such a condition as is intended by the law to be annexed to anything, is as strong as if the condition was put in writing.

2 Coke upon Lytt., 233, *b*, Sec. 378.

That a condition in law, by force of a statute that giveth a recovery, is more strong than a condition in law without a recovery.

2 Coke upon Lytt., 233 *b*.

10 Coke Eng. Rept., 42 *a*.

The bank bills of the complainants impounded in the hands of the assignees died in the hands of the defendants' agents by the suit of said assignees in the Superior Court of Chatham County (Record, Folio 8). But the life of the debt against the corporation and stockholders, revived by the entry of the decree of judgment thereon June 30, 1873. (Folio 11.) Plaintiff submits that said judgments are valid in evidence of the debt sued on in this action; and if the bank notes, as such, died in the hands of the assignees, then the debt revived with the decree of judgment against the corporation and stockholders at that date; and therefore said debt does not come within the period limited or barred by the act of March 16, 1869.

[4] See opinion Supreme Court of Georgia January Term 1877. Cherry vs Lamar.

The decree of judgment discharging the assignees from their trust, established the ultimate liability of the defendants. The assets assigned were exhausted and applied. The deficiency could be shown in no other way. The bank bills vouchers of debt protested June 25, 1873, are also evidences of debt, or the ultimate liability of said defendants at the date of said decree rendered. The evidences of the indebtedness of the corporation was acknowledged to be due and valid by the agents of the corporation after Jan. 1, 1870, and payments made on the debts after that date; and the ultimate liability of the corporation could only be known by exhausting the assets assigned. The bank bills, vouchers in this suit, were issued and circulated as money, and intended to be used and circulated as money during the existence of said bank's charter, unless demand of payment was made at an earlier date. Upon demand is the understanding and words expressed in the contract of the corporation, and the liability of the stockholder to the billholder was conditional and collateral thereafter. Bound at all times and ultimately liable (upon condition broken), which comports with the nature of a trust, upon condition.

When the principal debtor is exhausted, the trust estate, ultimately liable for the debt, becomes subject to the action of complainants.

Pollard vs Bailey 20 Wal 525.

Demurrers of the Defendants.

And for a further cause of demurrer to the whole of the said bill, the said defendants show that the said several causes of action in the said bill set forth, if any such there were or are, existed before June 1, 1865, as appears by the said bill; yet the said complainants did not file their said bill until April 6, 1874, after the 1st day of January, 1870, &c.

The defendants were liable for the ultimate redemp-

tion of the bills and notes, or rather the debts of the bank, incurred by *the issue of the bills and notes* as before stated. That the ultimate liability could only be ascertained by exhausting the assets of the bank. The liability of the stockholders was secondary, not primary. The corporation was the principal; the stockholder was the indemnity or guarantor to the bearer of the bills.

Insolvency of the corporation or failure of the bank is not included in the causes of action stated in the statute against the corporators. That is cause of action against the corporation.

The default of the corporation gives the right of action against the principal. But insolvency or failure is not included in the statute as a right of action for the ultimate liability of the defendants. Under the common law the right of action by the billholder against the corporation, by proof of insolvency or failure, accrues; and if the right of action of the billholder against the stockholder had existed at common law, as against a co-partnership without incorporation, then said right of action would have existed against the stockholder upon proof of insolvency or failure.

But insolvency or failure, is not given as a right of action, against the stockholder. The right of action against the stockholder, is for the ultimate liability only; and we cannot add to, or take from the Statute. The defendants in their demurrers fail to show that any ultimate liability of the defendants had accrued or existed before June 1, 1865, and if no ultimate liability of the defendants accrued before June 1, 1865, under a strict construction of the statute; then complainantsare not within the purview of the act plead. The principal must have been exhausted, to show the deefiiency or amount of the ultimate liability of the (indemnity or guarantors) defendants.

The demurrers of the defendants in substance alleges, that the bank bills of said bank, upon its insolvency or failure, lost their quality of a medium of circulation; and degenerated from a right in possession into a right of action only, at some indefinite period of time, before June 1, 1865; and that the then right of action of the then bill-holder, accrued against the then stockholders of said Planters' Bank. If this action was brought under the common law, against a mercantile firm, for notes of hand issued, the common law rule would apply; but this action being brought on the statute, for the ultimate liability of the defendants under the statute; then the statute strictly construed, must rule the course of action.

In Bullard *vs.* Bell, 1 Mason 243, Chief Justice Story says: "a note payable to bearer is often said to be assignable by delivery; but in correct language, there is no assignment in the case. It passes by mere delivery, and the holder never makes any title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker, (the corporation) to pay any person who shall become the bearer. It is therefore payable to any and every person who shall become bearer; and to every person who exclusively holds the note *bona fide*; not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer. The case is still stronger in relation to bank notes; for in the common transactions of life they pass by delivery as cash, &c. * * * * Bank notes payable to bearer, are always deemed good while they are in circulation &c. * * * The debt which the plaintiff claims from the defendant, is a sum which the latter never owed to any other person; it is a chose-in-action, originally vested under the statute in the present plaintiff, and which has never been assigned."

This authority is a leading and standard authority of law, and fully applies in this case. The promise in the

bill to pay the bearer on demand is the act of the law. It is the requirement of the statute to make the bill valid, and that validity exists in the bill so long as the corporation exists *de facto*. The authority of the statute moved the right of action from the original taker of the bill to the bearer of the bill; and previous to condition broken by the corporation the debt claimed by the plaintiff from the defendant is a sum which the latter never owed to any other person, and the debt could by no possible means have accrued to the plaintiff before he became the bearer of the bills. And therefore, admitting the act of March 16, 1869, to be a valid and constitutional act of limitations as to contracts and debts due before June 1, 1865, the present action does not come within the purview of the act plead, and the demurrer of the defendants fails on that ground.

Further: In Crease *vs.* Babcock, 10 Metcalf, 525, in a suit by bill-holders against stockholders of the Chelsea Bank, Chief Justice Shaw, delivering the opinion, says: "The next question, argued as a separate and distinct question, *and one of considerable importance*, is whether this remedy is confined to those who were holders of the bills at the time when the bank's charter expired, by the repeal of the act of incorporation, * * * or whether it is necessary for the complainant, in order to maintain this suit, to prove affirmatively that they were the holders of the same bills in respect to which they now claim as creditors in this suit when the charter expired. Upon this question the court are of opinion that the remedy is not confined to those who were the holders at the time of such repeal, and that it is not necessary for the complainants to give proof of the fact; but when any person, after such repeal, took such bills in the ordinary course of business, or otherwise acquired a good title, such bills are remaining unpaid within the provisions of the statute giving this remedy, and the holders of them have the

right to come in and claim as creditors, &c. * * * It was argued that although the bills were negotiable, yet the statute of liability, when once fixed, is personal to the then holder, and cannot pass to any other person by transfer of the bills. But we cannot feel the force of this argument. If the statute had provided that the persons then holding the bills should be entitled to claim, &c., there would have been more force in it; *but the same power that created this liability could as easily annex it to the bill, and make it to pass with the bill to any one who should become the holder, and this we think is precisely what the statute has done.*"

And complainants not only claim the benefit of the law as expounded by the courts, but they claim the benefit of the provisions of the code of Georgia, and the benefit of the provisions of the new constitution, adopted in 1868, set out and referred to in the statement in this brief.

The *lex loci* of the transaction under the statute rules the *action at bar*.

26 Georgia, 27, (1,) (2,) (3;) Robinson *vs.* Beale.
8 Georgia, 476, (6,) secondly, &c.; Lane *vs.* Morris.
56 Georgia, 205, 6, 7; Cohen *vs.* Prater.
10 Nat. Bankruptcy Reg., 289–93; Wilson & Shober *vs.* Bank of North Carolina.

This suit is for the ultimate liability of the defendants as stockholders of the Planters' Bank. They are bound in no other way.

20 Wallace, 520; Pollard *vs.* Bailey.

In the case of Pollard, he was bound for the proportionate part of all of the debts of said bank, and that gave him the right to have the assets of the corporation exhausted and applied to the payment of the corporate debts before his liability accrued. In the present action the defendants are bound for the proportionate part of

the ultimate liability; and if no action would lie against Pollard until the assets of the bank were exhausted, no action could lie against these defendants until the assets of the corporation were exhausted and the ultimate liability of the defendants was ascertained. Our case is not only founded on the equities set out in the bill, but it is founded on the facts necessary to constitute a cause of action. Equity requires the corporate assets to be exhausted and applied before the ultimate liability attached.

But the defendants plead, that said bank-notes were issued before June 1, 1865, and by rule of common law said notes became due, and the liability of said defendants to pay the contracts and debts of said bank, and their ultimate liability for the redemption of all of the bills and notes issued by said bank, *if ever*, accrued when said bank became notoriously insolvent, failed, &c., before June 1, 1865, and that the same are barred by a failure to institute suit thereon by Jan. 1, 1870, as required by act of the General Assembly of Georgia, passed March 16, 1869, entitled "An Act in relation to the statute of limitations and for other purposes."

Appellants submit that the appellees are mistaken in the facts and in the law as applicable to this action.

1st. Complainants' bill is founded upon the statute of incorporation for the proportionate part of the ultimate liability of the defendant stockholders; but is not brought under the common law, nor for the primary liability of the defendants. The defendants are liable for the proportionate part of the ultimate liability or debts of the bank only, and the statute must be construed strictly, and under the statute the insolvency of the bank, nor the failure of the bank is not given as a cause of action against the stockholders. Their liability is for the proportionate part of the ultimate liability or debts of the bank found to be due after its assets have been exhausted.

And does not arise until said assets are exhausted, precisely as in Pollards Case.

2d. Plaintiff submits that under the statute the charter extends to the year 1881, (Code of Georgia, 1867, § 1682.) That said charter has not been repealed, annulled, or judicially determined; and that the bills, vouchers in this action came to complainant in 1873 by delivery. (Folios 12 and 13.) And that the bills so acquired carried therewith all the rights of a present issue under the charter, and therefore said bills do not come within the common law rule contended for in the appellees' demurrer.

10 Nat. Bankruptcy Reg'r, 289–93.

Wilson & Co. *vs.* Bank of N. C.

That a portion of the appellants' claim in the cause show that the bills of the bank were filed with the assignee as proof of debt against the bank in December, 1869, (folios 6 and 7,) and payments made thereon, and final decree of judgement, therefor, was rendered June 30, 1873, and the debt fully acknowledged as due to the appellants in 1873, and that they labored under disability from bringing suit against the defendants in this action until June 30, 1873, and therefore appellant's right of action does not come within the purview of the act of March 16, 1869. But under the sixth section of said act all rights of action, which accrued prior to June 1, 1865, not barred on the sixteenth day of March, 1869, it was required that suit must be brought by Jan'y 1, 1870, or both the right, and the right of action to enforce it, shall be forever barred. * * * * Whether the right of action had actually accrued prior to June 1, 1865, or was then only *inchoate and imperfect*, if the contract or liability was then in existence.

This demurrer of the defendants presents the question to this court, whether complainants claim and the bills filed as vouchers in the cause come within the purview of the act plead; and if so, whether the appellants' right of action had accrued before Jan. 1, 1870, or was at that

date only inchoate and imperfect, and only actually accrued and became due in June, 1873?

If this court determines that the right of action accrued in June, 1873, then the question arises, was the appellants' claim barred by act of March 16, 1869, while yet inchoate and imperfect, and impossible of enforcement?

Is the sixth section a valid enactment? The eighth section says: "That all cases of the character mentioned in any section of this act which have arisen, or in which the right of action of the liability has accrued, or the contract has been made since June 1, 1865, shall be controlled and governed by the limitation laws as set forth in the revised code, adopted by the new constitution.

This section evidently, also, would govern the action at bar; the action accruing after January 1, 1870, is controlled by the Code; and, as before shown, the 8th section is in conflict with the former sections of the act. In the preamble of the act it would appear that the limitations intended by the act related to accounts and common law rights of action only; but the third, fourth, and sixth sections have a different meaning, and are in conflict with, and repugnant to, the preamble of said act; and the latter part of said act (section eight) as quoted. If the former part of said act stands as valid, the latter part of said act must be void. But the question arises, whether section eight of said act is not virtually a repeal of the former sections? Section eight is in conformity to the code and laws as they existed in Georgia before the passage of the act in question; while the former sections of the act are repugnant to the constitution and laws of Georgia, and the Code of Georgia, as they existed at the date of the passage of the act March 16, 1869.

Constitution of Georgia, art. I, sec. 26, 32; art. XI, sec. 4.

Code of Georgia, 1867, Pre. Pro. 4, § 6, §§ 2865, 1685, 3140, 3141.

30 Georgia, 774–'5, Dougherty *vs.* Bethune.
10 Georgia, 190, Winter *vs.* Jones.

If the proviso of a statute be directly contrary to the purview of the statute, the proviso is good, but not the purview, because it speaks the latter intentions of the legislators.

Bacon's Abrig. Stat., l. 2.
Fitzgibon, 195, Att'y General *vs.* Gov. of Chelsea, W. W.

The statute of incorporation is not mentioned in the act of 1869, and is not repealed by the act of 1869, except by implication and legislation by implication is prohibited under the constitution. (Art. III, sec. 6, par. 3.)

But, for the argument of this cause, let us assume that the theory of the defendants in their demurrers as to their liability arising before June 1, 1865, is correct. That the right of action of complainants existed at the date, and vested at the date, of the issue of the bills, and then what aspect does this case present? We must first inquire the *lex loci* existing in Georgia at the date of the issue of the bills. Said bank bills, all having been issued in Georgia, the statute of franchise and the *lex loci* ~~must~~ of the transaction must govern and control this cause.

The statute says, "that the persons and property of the stockholders for the time being in said Planters' Bank shall be pledged and bound in proportion to the amount of shares that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank during the time said stockholders hold such stock, in the same manner as in ordinary commercial cases or in simple cases of debt" (folio 3); and if the bills were of a legal and valid issue at that date, Dec. 5, 1859 (folio 3), then by the user of said franchise, said stockholders pledged and bound their private estates as a trust fund, and by

force of the statute and their personal acts they were trustees for the ultimate redemption of the proportionate part of the bills issued and the debt created by the corporation, and the trust run for the benefit of the bearer of the bills, for the security of the debt.

Hotchkiss' Code of Ga., 72, Sec. 14.
do. do. do. 352, (33)
do. do. do. 365, (90)
11 Ga., 502, Thornton *vs.* Lane.

The right of action at that date existed for twenty years. The defendants plead that the right of action existed before June 1, 1865. How or by what means said right of action existed, is not set forth in the demurrer. But, assuming the demurrer to be true, as to the date that the right of action accrued, what was the status and condition of plaintiffs' right of action at that date? The bills in evidence of the debt sued on, were issued by said bank into the hands of the public, to complainants, unknown; the right of circulation and delivery by bearer not restricted or illegal, how was complainants' rights of action affected by the alleged maturity of the bills? If the bills were due, the bearers had waived their right of demand and the enforcement of their action. Their right of action at that date extended for twenty years, except as stayed by the stay laws of the State. The corporation and the defendants had both waived their rights of legally declaring the corporation insolvent, and exhausting the assets and applying the same to the payment of creditors before June 1, 1865. If the holders of the bills waived their rights to commence suit against the corporation, the defendants also waived their rights of ascertaining the ultimate liabilities of the corporation before June 1, 1865, and if complainants' right of action vested as plead in the demurrer before June 1, 1865, then the statute of limitations commenced to run on complainants' right of action at that date, and the

right having vested, and the limitation thereon having commenced to run, no subsequent enactment ment of the legislature could intervene to divest the right thus attached, until the full limitation had expired.

Code 1861, § 2857, 1440.

3 N. Hampshire, 482–3; Woort *vs.* Winnick.

11 Mass., 406; Holden *vs.* James.

13 B. Monroe, Ky.; 19,–20—25,–26; Slack *vs.* R. R. Co.

10 California, 307–8; Scarborough *vs.* Dugan.

6 Smeedes & Marshall, 521; Nevitt *vs.* Bk. of Port Gibson.

2 Greene, Iowa, 243: Gordon *vs.* Mount.

2 do. do. 244; Hinch *vs.* Weatherford.

And the rule of law is, persons acquiring bank notes receive all the rights and equities of the grant conferred by the charter.

8 Wallace, 63–4; Furman *vs.* Nichols.

Plaintiff submits that if his right of action on the vouchers in this suit accrued and vested in May, 1865, then his right of action at that date had a validity of twenty years, under the laws and code of Georgia then in existence; and if said bank bills outstanding at the date of the insolvency of the bank degenerated from a chose-in-possession to a chose-in-action only, as plead by the demurrer, then complainants acquired no title to a right of action for the debt by the mere transfer of the bills. If the debt became fixed (upon the insolvency of the bank) in the then holder of the bills, no transfer of the debt could be made without assignment thereof. But plaintiff submits that said plea cannot be true. No demand of payment of the bills, no suit against the corporation, or assignments or public default of the corporation having been made before June 1, 1865, no condition in the charter was broken, to render the defendants ulti-

for the sum due before that date

mately liable under the statute; and if the demurrer is sustained as plead, the defendants are released from the payment of their liability under the statute without consideration or value. Complainants submit that the defendants' plea of demurrer is repugnant to the statute of incorporation of said bank, and does violence to the intentions of the General Assembly of Georgia enacting said statute. It cannot be a reasonable construction of the intentions of the General Assembly of Georgia to say "that said General Assembly would enact a law declaring the liability of said defendant stockholders under the charter, and after said defendants had used the franchise and reaped the benefit of said grant, and then, upon condition broken, and the liability of the defendants accruing under the sovereign will, that said defendants should be freed and discharged by a common-law construction of the act of charter, whereas, by strict construction of the statute, defendants are liable as stockholders in this action. The presumption of law is that the General Assembly intended to do in fact; *what they plainly purported to do in the act.* And the intention of the General Assembly is the law. They intended to make the stockholders liable, so as to secure the payment of the debt to the bearer of the bills.

and without day in court.

If the demurrer is true, then plaintiff submits that the common law rules the statute; whereas the decisions are that where the statute prescribes a certain form or mode of action in derrogation of common law, that form or mode must be pursued strictly.

Bacon Abridg. (G), title: Statute; a Negative Statute, &c.

1 Shars. Blackstone, bk. 1, 88, (7.)

The sovereign will is the law.

1 Comstock, N. Y., 58; Corning *vs.* McCullough.

9 Georgia, 213; McLeod *vs.* Burroughs, opin. 216; also 221, note 3.
10 Georgia, 190; Winter *vs.* Jones.

Complainants contend that their right of action did not accrue before the assignment of the bank, nor did not accrue before the assets of the bank had been exhausted and the assignees discharged—June 30, 1873; and therefore defendants' demurrer fails on that ground. The present action does not come within the purview of the act. But if the court hold that the liability of the defendants in this action did accrue before June 1, 1865, then complainants plead the unconstitutionality of said act of March 16, 1869, as a bar to this action.

The complainants' suit being founded on the statute, is founded on the highest record of the State known to the law.

1 Shars. Black., bk. 1, 185–6.
3 Comyn's Dig., 265, (A, 4;) title, Covenant.
6 Bacon Abridg., 377, (D;) title, Lien of Actions.

The sovereign will, it must be construed strictly, (9 Georgia, 221, note 3, McLeod *vs.* Burroughs,) and exists for the time for which it was enacted.

Bacon Abridg., tit. Stat. D.
2 Coke upon Lyttleton, *b* 236, sec. 384.
Code of Georgia, 1867, sec. 1677.

The action is properly brought. An action of assumpsit would not lie. There is no promise by the defendants on which to found an assumpsit. The action of debt lies by the act of the defendants in the user of the franchise, under the statute. Some words make a covenant in law though there be not any express covenant.

3 Comyn's Dig., *265½, (A, 4;) title, Covenant.

The right of action exists not by right of any contract, but by duty of the defendant under the law.

The *lex loci*, as heretofore shown, gave to the complainants a right of action that existed for twenty years. A bank of issue is a private corporation under the laws of Georgia. (Code 1867, § 1673 :)

"Private corporations heretofore created without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution by the will of the State."

Code of 1867, §§ 1671, 1672, 1673, 1[illegible] 1685, 1688.
54 Georgia, 404, Central R. R. *vs.* [illegible]gia.

The charter of said bank was not r[illegible]
tions 1687, 1677, 1682, 1688, 2865 of t[illegible]
was not repealed by act of March 16, 186[illegible]
III, sec. 6, par. 3 of the Constitution of Georgia, 1868, in full force at the date of the passage of said act.)

The act of March 16, 1869, as plead in this cause, is in restraint of right, penal in its nature, and therefore must be construed strictly.

13 Johnson, N. Y., 497; Sickels *vs.* Thorpe.
3 Paige, N. Y., 338; Salters *vs.* Tobias.

Said act was retroactive and retrospective entirely in its operations and character. It did not purport to govern, affect, or bar any contract to be made after its passage, or any right of action accruing after its passage; but affected and operated upon those rights of action and contracts which were in existence and had vested before June 1, 1865, only. It was not prospective in its operations as to contracts and rights of action thereafter to be made or accrued, and was clearly in conflict with the Code of 1867, in existence at the date of its passage.

Code, 1867, Pre. Pro., page 4, § 6.
1 Otto, 636, County of Moultrie *vs.* Savings Bank.
Sedgwick on Statutes, 160–5.
Sedgwick on Stat. and Const. Law, 188–224.

9 Georgia, 213; McLeod *vs.* Burroughs, opin. 216; also 221, note 3.

10 Georgia, 190; Winter *vs.* Jones.

Complainants contend that their right of action did not accrue before the assignment of the bank, nor did not accrue before the assets of the bank had been exhausted and the assignees discharged—June 30, 1873; and therefore defendants' demurrer fails on that ground. The present action does not come within the purview of the act. But if the court hold that the liability of the defendants in this action did accrue before June 1, 1865, then complainants plead the unconstitutionality of said act of March 16, 1869, as a bar to this action.

The complainants' suit being founded on the statute, is founded on the highest record of the State known to the law.

1 Shars. Black., bk. 1, 185–6.

3 Comyn's Dig., 265, (A, 4;) title, Covenant.

6 Bacon Abridg., 377, (D;) title, Lien of Actions.

The sovereign will, it must be construed strictly, (9 Georgia, 221, note 3, McLeod *vs.* Burroughs,) and exists for the time for which it was enacted.

Bacon Abridg., tit. Stat. D.

2 Coke upon Lyttleton, *b* 236, sec. 384.

Code of Georgia, 1867, sec. 1677.

The action is properly brought. An action of assumpsit would not lie. There is no promise by the defendants on which to found an assumpsit. The action of debt lies by the act of the defendants in the user of the franchise, under the statute. Some words make a covenant in law though there be not any express covenant.

3 Comyn's Dig., *265½, (A, 4;) title, Covenant.

The right of action exists not by right of any contract, but by duty of the defendant under the law.

The *lex loci*, as heretofore shown, gave to the complainants a right of action that existed for twenty years. A bank of issue is a private corporation under the laws of Georgia. (Code 1867, § 1673 :)

"Private corporations heretofore created without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution by the will of the State."

Code of 1867, §§ 1671, 1672, 1673, 1682, 1685, 1688.
54 Georgia, 404, Central R. R. *vs.* State of Georgia.

The charter of said bank was not repealed, nor sections 1687, 1677, 1682, 1688, 2865 of the Code of 1867 was not repealed by act of March 16, 1869. (See Art. III, sec. 6, par. 3 of the Constitution of Georgia, 1868, in full force at the date of the passage of said act.)

(not in library)

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1 Otto, 636, County of Moultrie *vs.* Savings Bank.
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Sedgwick on Stat. and Const. Law, 188–224.

No repeal of the charter of the Planters' Bank is stated in said act, nor was any right of action arising under said statute of charter specially mentioned. No repeal of any section of the Code is referred to; therefore said act of March 16, 1869, is a nullity as a bar to complainant's action. The General Assembly, "the sovereign authority," have not shown any intention by said act to repeal the said charter, or the said sections of the Code mentioned; but section 8 sustains the Code, and no repeal of these laws by implication could be made by said act, under the existing constitution. The act as plead in bar of complainant's bill must fail on that ground. The said act is a nullity as a repeal of the *lex loci* of the transactions of said corporation, made before the existence of the act. No expression of the sovereign will is directed as a repeal of any specific law then in existence, and repeal by implication will not avail. (Art. III, sec. 6, par. 3, New Constitution.) Said act must be construed strictly.

2 Johnson, 379, Jones *vs.* Eustis.
9 Bacon's Abridg., 224; Title, Statute.
6 Cranch, 135, Fletcher *vs.* Peck.
9 Cranch, 45–51, Terret *vs.* Taylor.
8 Wallace, 63–4, Furman *vs.* Nichols.

That if said right of action by the complainants did not exist from the date of the issue of the bills in proof of debt, then said right of action was inchoate, and had not attached within the State of Georgia, until the date of the discharge of the assignees; by which act the bank was exhausted, and by which process the ultimate liability of the stockholders to pay the debts of the bank accrued; and the act as plead in the cause will not apply to bar the action. And if held to apply, then complainants' right of action was barred without day.

The right would have been barred before the remedy

existed, and the principle of law laid down by the Supreme Court of Georgia in Black *vs.* Swanson, 49 Georgia, 425, would be the rule in this case. Judge Tripp says (page 427): "The note held by plaintiff in error, though made before, was not due until after June 1, 1865. No right of action accrued until after that date; and by the act of March 16, 1869, it is controlled by the limitation laws set forth in the Code. As by those laws his right of action would not be barred until December, 1871, and as he had pleaded the note in June, 1871, as a set-off to an action brought against him, he is entitled to recover thereon, so far as he is affected by the statute of limitations." And this is a common law ruling.

Another fact may be mentioned: "The stay laws enacted by the State of Georgia existed of force in Georgia from 1861 to July 21, 1868;" and if complainants' action accrued in 1865, as plead in the demurrer, then complainants' right of action, which accrued under the statute, and vested under the Code for twenty years, was curtailed and shortened by the General Assembly of Georgia to the period of seventeen months and ten days, to wit, from July 21, 1868, to Jan'y 1, 1870, by said stay laws, and completely barred on January 1, 1870, by the act plead. But complainants submit that this construction of the act, as plead in this cause, cannot be true. The bills in proof of debt were legally issued, payable to the bearer on demand in twenty-two years, or during the existence of the bank's charter to 1881, on demand of the bearer. And this is the only condition implied. Without demand of the debt no condition is broken under the statute, and the contract of the corporation runs to the bearer of the bill; the chose-in-possession remains in the bearer of the bill until the chose-in-action arises by demand, and accrues to the bearer by default of the corporation. The corporation having defaulted, and its assets having been exhausted, the ultimate liability arises.

Ross vs Jones: 22 Wallace 573. — 4,

This is the common sense wording of this statute, and where the statute and the common law differ, the statute construed strictly, must rule the common law. No right of action under this particular statute accrued to complainants in this suit, before June 1, 1865. No cause of action arose between complainants and defendants before June 1, 1865; to be barred by act of March 16, 1869; And as the Supreme Court of Georgia, decided in Black *vs.* Swanson, so complainants contend that their right of action in this cause falls within the provisions of the code, and the statute laws of Georgia in existence at the date of the issue of the bills, and in existence at the date of the assignment of the bank. Or in other words, the proviso of the act governs the purview; as in *pari materia* with the constitution of delegated powers conferred on the General Assembly, and in force at the date of the passage of the act. And the first seven sections of the act are repugnant thereto.

But should the court disagree with me as to the exact date, that the right of action accrued in this cause, and hold that complainants' right of action, existed before June 1, 1865, then complainants plead that the first seven sections of said act, are unconstitutional and void as a bar to complainants' bill. If the defendants demurrer had fully and clearely stated, that the act of March 16, 1869, repealed the act of incorporation of said Planters' Bank, making the stockholders liable for the debts of the bank, not sued on before January 1, 1870, then the question would have been fairly put, as to the liability of the defendants in this action; or, if said plea had stated that the defendants were discharged from their liability, by the repealing clause of the act of March 16, 1869, then that question could have been decided upon its merits. But the defendants' demurrer seeks to advoid the main issue, and attempts to show by a rule of common law that the ultimate liability of the stockholders in this

action, accrued and became due upon the insolvency of the corporation; and that the complainants' claims in this suit comes within the common law rule. Whereas this suit of complainants is founded on the act of incorporation which takes this case out of the common law rule, and this cause is governed by the statute strictly construed.

The statute of incorporation being strictly construed, makes the defendants stockholders clearly liable; and the act of March 16, 1869, plead in bar, is an act in restraint of right, and, construed strictly, does not repeal or annul said act of incorporation, nor embrace within its terms bank bills issued under said act of charter; nor does any ruling by the Supreme Court of the State sustain said demurrer as to bank bills.

The demurrer of the defendants, if allowed as plead in this cause, destroys a right of action, and destroys a remedy that existed for the collection of the debt sued on, as a vested right of action, existing for twenty years, at the date of the passage of said act, and existed as a vested right of action at the date of the alleged failure of the bank; and said act, if applied as plead in the demurrer in this cause, gives a defence to the defendant stockholders that did not exist at the date of the issue of the bills, nor did not exist at the date of the alleged failure of said bank, nor did not exist at the date of the final decree June 30, 1873, the date of the judgments sued on in this action; and therefore said act is unconstitutional and void as a bar to complainants' suit.

New Constitution Art. XI, Sec. 4–5.
New Constitution Art. I, Sec. 26–32.

That if it was sought by the General Assembly of Georgia, by act of March 16, 1869, as plead in said demurrers, to annul the vested rights of demand for the debts due in this action, and to bar the remedy for the

collection of said debts, before said rights and remedies would have been barred by the laws of Georgia in existence when said right of action accrued, then said act of March 16, 1869, should be held unconstitutional and void, as a bar to this action; and if it was sought by the General Assembly of Georgia, by said act, to annul the vested rights of complainants without day, while inchoate and imperfect before the right of demand could be made, wherein and whereby complainants could proceed to enforce their said rights of action and remedies for collection of said debts sued on, then said act of the General Assembly, is and ought to be declared unconstitutional and void, as a bar to collect the ultimate liability, the final and concluding liability of said corporation and stockholders under the statute.

In White *vs.* Hart, 13 Wallace, 652, the court says: "It is well settled by the adjudications of this court that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition they are substantially the same thing. * * * * * * Again, on page 653, nothing can be more material to the contract than the means of its enforcement. *Without the remedy the contract may, indeed, in the sense of the law, be said not to exist*, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. *The ideas of the validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution of the United States against invasion. The obligation of a contract is the law which binds the parties to perform their agreement.* * * * * * Again, on page 654, the court says: "When the contract here in question was entered into, ample remedies existed; all were taken away by the proviso in the new constitution." * * * * * So all of the complainants' rights and remedies in this

action were swept away and nothing is left, if said acts of limitations is sustained as plead in this cause.

If the act of March 16, 1869, is sustained here as a valid and constitutional act; and the demurrers of the defendants are adjudged to be true as plead, every means for the enforcement of complainants' claim is denied; and was denied when complainant became bearer of the bills protested June 25, 1873, and this denial involved the annihilation of the statute of charter before the chose-in-possession was merged into a chose-in-action, by the determination of the ultimate liability against the defendant stockholders. The validity of a vested right under the statute is annulled without consideration, within the time limited, by the laws in existence at the date the right of action accrued.

The sanctity of the legislation, conveying rights by the user of a franchise of charter, is destroyed without consideration. The protection given to complainants by the statutory rights in existence at the date of the adoption of the constitution of Georgia of 1868, are ignored and set aside; and the right of action of the complainants, which constituted a specialty of twenty years at that date, is barred without payment, without day; and the defendants are thereby relieved of their liability for the payment of the debt sued on without consideration.

But complainants submit that said act is not a valid law to bar said rights of action. The purview or sections which seek to destroy complainants' right of action and bar their remedy for the collection of the debt sued on is, in so far as all previous contracts and rights of action vested before its passage are concerned, itself a nullity. Cooley on Constitutional Limitations, 289–90–7, says: "But a law which deprives a party of all legal remedy must necessarily be void. If the legislature of a State were to undertake to make a law, preventing the legal remedy upon a contract lawfully made and binding

on the parties to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligations of the contract within the meaning of the constitution.* (Coll *vs.* Hagger, 8 Mass., 430,) * * * * and where a statute does not leave a party a substantial remedy, according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper or embarrass the proceedings to enforce the remedy so far as to destroy it entirely, and then impair the contract so far as it is within the power of the legislation to do it, such statute cannot be regarded as a mere regulation of the remedy, and is void."

15 Wisconsin, 28–31; Oatman *vs.* Bond.
56 Penna., 46; Penrose *vs.* Erie Canal Co.,
18 Wallace, 548; Boyce *vs.* Tabb.
21 " 251; Ochiltree *vs.* R. R. Co.,
2 " 21; Hawthorne *vs.* Califf.
Art. I. Const. of the U. S., Sec. 10.

In 10 Geo., 195–6. (2) (3) (4) (5) Winters *vs.* Jones: Chief Justice Lumken says: "A constitutional act of the legislature, which is equivalent to a contract when performed, is a contract executed, and whatever rights are thereby created a subsequent legislature cannot impair; and the authorities therein quoted." See opinions 198 to 201.

In 53 Georgia, 512, Branch *vs.* Baker, Chief Justice says: "The plaintiffs in the several suits now before the court, are the bill-holders of the bank suing on that contract, and are endeavoring to enforce the same. The pleas of the defendants do not allege that contract to have been illegal, because it was in aid of the rebellion, and if the several matters of defence set forth in the defendant's pleas, are authorized by Section 17 of the 5th Article, Par. II, of the Constitution of 1868, the same

is unconstitutional and void as to the contracts made prior to the date thereof, because it impairs the obligation of the contract sued on, by creating a defence to that contract, which did not exist when that contract was made, and otherwise invades the rights of the plaintiffs as to their remedy to enforce that contract, which did not exist at the time when the contract was made.

The pleas of the defendants, and the evidence offered thereunder as to the illegality of the contracts sued on by the plaintiffs, constituted no legal or valid defence thereto as against the plaintiffs, who are the holders of the bills of the bank, issued in pursuance of its charter."

Also, same opinion: "When the stockholders accepted the charter of the bank, it became a contract between them and the state, by which they were bound in accordance with the terms thereof." Not as a contract between the stockholders and the bill-holders, but a contract between the state and the stockholders for the benefit of the bill-holder; the contract in the bill running from the corporation to the bearer. The Statute alone showing the indebtedness of the stockholders on condition broken.

The trust conferred upon the stockholder by the state, upon condition broken, reverted to the benefit of the bearer of the bills. This liability of the stockholders to the bill-holders, was not upon any contract made between the parties, but that liability of the stockholder resulted upon the failure of the condition in the grant. That liability was not primary, but it was a liability of indemnity; the ultimate liability for the debt of the corporation, remaining unpaid after the assets of the corporation were exhausted and applied on the outstanding debts of the bank, as expounded by the sovereign will, the omnipotent authority over delegated powers of the state.

Mr. Justice Tripp, concuring in the above opinion, says: "1st. Actions brought by the *bona fide* holders of the bank bills, which were issued by the bank, payable to the bearer, and which passed into circulation as money, cannot be controlled by the provisions of the 2d Par. of the 17th Sec., Art. V. of the Constitution of 1868; nor can the illegality of such issue by the bank as contemplated in said provisions, be set up as a defence, against the right of such holder to a recovery.

2d. If said provisions of the constitution were intended to apply to such cases, they are void under the tenth section of Article 1, of the Federal Constitution, in as much as they are not only annul subsisting contracts, which were otherwise legal and valid, but imposes upon the holders of such bills impracticable conditions in cases of certain defences, and which practically deny all right of recovery."

The complainants insist that their cause of action did not arise until after June 1, 1865, and that their cause of action is not controlled by any of the seven first Sections of the Act of March 16, 1869, but, if within the purview of said act at all, then their said right of action is controlled by the 8th Section of said Act as regulated by the Code adopted by the New Constitution, July, 1868, because the act, as plead, invades subsisting contracts which were otherwise legal and valid, and gives defences which practically deny all right of recovery against the defendant.

That the General Assembly of Georgia did not repeal, alter, amend, or change the charter of said Planter's Bank; nor did not intend to repeal, alter, or change the charter of said Bank, or the Code of Georgia then in existence as statute law, by the enactments of said Act of March 16, 1869, and if said General Assembly did intend to repeal, change, or alter the charter of said Bank, and did intend to apply the provisions of the 3d,

4th, 5th, and 6th Sections of said Act, to rule and regulate the charter of said Bank, and to rule and regulate the Code of Georgia in existence as statute law at the date of its passage, so as to apply the provisions of said Act, in bar of complainants right of action in this suit, then complainants submit said Act of March 16, 1869, to be unconstitutional and void under Section 10 of Article I, of the Federal Constitution. And complainants submit, said Act to be repugnant to the Constitution of Georgia. Art. I. Sections 26 and 32; also Art. III. Sec. 6. Par. 3; also Art. XI. Sec. 4–5; and the General Assembly of Georgia could not exceed the authority delegated by the constitution, conferred on them by its adoption in 1868. 2 Story on the constitution, § 1385. "*A Fortiori*, a law which makes a contract wholly invalid, or extinguishes it, or releases it, is a law impairing it."

Under the code of Georgia, 1867, § 2865, existing as the statute law of Georgia at the date of the passage of said act, the complainants right of action existed for twenty years as a vested right; and if their right of action accrued before June 1, 1865, as alleged in the demurrer, then their right of action was stayed by the stay laws of Georgia until July, 1868; and the statute of limitations had run only eight months on complainant's rights of action at the passage of said act; and assuming the demurrers to be true, that complainant's claims had vested, as alleged, with a right of action for twenty years—upon what principle of law could any act of the General Assembly of Georgia, intervene to cut short the statute of limitations already attached?

Assuming the demurrers to be true, that the right of action existed before June 1, 1865, then the greatest length of time the statute could have run up to January 1, 1870, was 17 months and 10 days. A vested right of

action for twenty years, was thus curtailed and cut short eighteen years and seven months by subsequent legislation.

This legislation could not be accomplished under the present Constitution of Georgia. See Art. XI. Sec. 4–5. In 16 Wallace, 317, Whitehead *vs.* Walker; the Court say: "The laws which exist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which effect its validity, construction, discharge, and enforcement. Nothing is more material to the obligations of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and are both parts of the obligation which is guaranteed by the constitution against impairment. * * * * any impairment of the contract—the degree of impairment is immaterial—it is within the prohibition of the constitution."

53 Geo., 511, Dobbins *vs.* Sibley.

In Hawthorne *vs.* Calif, 2 Wallace, 21, the court say: "Without stopping to discuss the question upon the statute, we think that the case falls within the principle of Woodruff *vs.* Trapnell, 10 Howard, 190, and Curran *vs.* State of Arkansas, 15 Howard, 304, heretofore decided by this court, &c." These cases maintain and confirm the validity and inviolability of a vested right under the statute. The arguments are long and exhaustive, the opinions clear and forcible, and are hereby referred to.

"Though one Legislature may repeal an act which another Legislature was competent to pass, as to usual legislation, yet when a law is in the nature of a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

9 Bacon's Abridg., 224, Statute last par.

6 Cranch, 135–6–7, Fletcher *vs.* Peck.

8 Wheaton, 75–6, also 91–3, Green *vs.* Biddle.

The Supreme Court of Georgia have passed upon the constitutionality of the act of March 16, 1869, in the following cases:

In George *vs.* Gardner, 49 Geo., 441, the Supreme Court say: "The act of 1869 is a general law, and has a general operation throughout the State as to the class of contracts specified in it; the private rights of no particular individual are specially varied or affected by it, as contemplated by the 26 sec., art. I of the Constitution of 1868. This construction of the act of 1869 does not invade or impair the obligation of the plaintiff's contract, and thereby render the act unconstitutional; *it only affects the remedy on that contract*—that is to say, it prescribes the period of time within which he should enforce his remedy therein in the courts of the State. In the opinion of the General Assembly 9½ months was a reasonable time within which plaintiffs should have their remedy to enforce the class of debts or claims specified in the act, and we cannot say that the time was so short or unreasonable as to make the act unconstitutional."

Complainants submit that by the first six sections of said act, "all rights and all rights of action, and the remedy to enforce the same, whether said rights of action had in fact accrued before June 1, 1865, or was then only inchoate and imperfect, if the contract or liability was then in existence" were barred by January 1, 1870; and if the demurrers are true, as plead in this cause, then complainants are barred by the act without day. Their right of action being inchoate and imperfect until June 30, 1873, they could not proceed to enforce it before January 1, 1870; and by the terms of the act are barred thereby, *except that the first six sections of the act are repealed* by the 8th section of the act last made, which is in direct conflict with the former part of said act; the 8th section says "that all cases of the character mentioned, &c., * * * * * shall be controlled and governed by the limitation

laws set forth in the Code;" which last-named section gives to complainants their full term of right of action as controlled by the Code, which is in accordance with justice and equity; but complainants submit that said act, as plead by the demurrer, is in direct conflict with sec. 26, art. I of the Constitution of Georgia. Said section reads: "Laws shall have a general operation; and no general law, affecting private rights, shall be varied in any particular case by special legislation, * * * * ."

The code in existence and of the force of statute law in Georgia at the date of the passage of said act, (page 4, Preliminary Provisions, § 6,) says: "Laws prescribe only for the future; they cannot impair the obligation of contracts, nor generally have a retrospective operation. Laws looking only to the remedy or mode of trial may apply to contracts, rights, and offences entered into, accrued, or committed prior to their passage; but in every case a reasonable time subsequent to the passage of the statute should be allowed for the citizen to enforce his contract, or protect his rights." And complainants here submit that said act did not have a general operation, as to its application on the rights and claims to be affected by it. That said act was entirely retroactive and retrospective in its application and effects upon the rights of individuals intended to be controlled by it. Said act barred contracts and rights of action in existence before June 1, 1865; but did not bar contracts and rights of action that was in existence at the date of its passage; that were made or accrued after June 1, 1865. It did not include, nor did not intend to affect or bar any rights, contracts, or actions to accrue, made, or become due after its passage; but it was intended to affect and control only those rights, contracts, or actions that were in existence, or had accrued or became due before June 1, 1865. That said act was a class legislation, intended to affect only those rights, contracts, or actions named

therein that existed, were vested, and due before the passage of the act, and did not intend to have a general application to all rights, contracts, or actions that existed, accrued, or became due after June 1, 1865, up to the date of its passage. That said act, if applied as plead in the cause, is in direct conflict with sec. 3 (see folio 3) of the charter of said bank, as heretofore set out and referred to; and said act is also in direct conflict with Art. III, § 6, par. 3, and Art. XI, § 4 of the Constitution of Georgia, of force at the date of the passage of the act. Did said act repeal, modify, or amend the charter of said bank? or did said act repeal, modify, or amend any section or part of the Code in existence as statute law of the State at the date of its passage? If it has done so by its repealing clause, or was intended to do so by any part of said act by implication, then said act is clearly in conflict with Art III, sec. 6, par. 3 of the Constitution, referred to. Said act, as plead in this cause, cannot stand in "*pari materia*" with the charter of said bank, nor with the provisions of the constitution as heretofore shown, nor with the provisions of the Code of Georgia as they existed (and herein quoted) at the date of the passage of said act. If the statute of charter as plead in this cause, and the Constitution and Code of Georgia stand as valid enactments, then the act of March 16, 1869, must fall. Or, if the act is sustained as plead in the cause, then the charter, the code, and the constitution must have been regulated and controlled by it. *A fortiori will not lie in this construction of the act.*

If the defendants' plea is true, as plead, then the plaintiffs' right of action that vested and existed for twenty years as a specialty (at the date alleged in demurrers of the defendants) was shortened to 9 months and 15 days after the passage of the act; in other words, plaintiffs' right of action that existed for twenty years

under the charter, was diminished 18 years, 8 months and 15 days under the act, the stay law of the State having intervened until July 21, 1868.

55 Georgia, Bell *vs.* Hank.

With all deference to the opinion of the General Assembly of Georgia, this interference with complainants' right of action as plead in this cause, could not be called a regulation of his remedy. Because his right of action was barred under defendants' plea before he received the bills sued on, no time whatever remained for the complainant to execute his remedy.

10 Georgia, 190, Winter *vs.* Jones.

13 Wallace, 647, White *vs.* Hart.

A denial of the remedy is a denial of the right. In the language of Justice SWAYNE, "the ideas of validity and remedy are inseparable, and both are parts of the obligation guaranteed by the Constitution of the United States."

Wharton's Conflict of Laws, § 397 *a*, 398, 399.

Sedgwick on Statutes, 104–5–6.

But again, under the Code of Georgia, in force and in existence at the date of the issue of the bills sued on as vouchers of the debt in this action, banking was restricted to incorporated banks.

Hotchkiss' Code, 356, S. 1 (54).

And the issue of bank bills was confined entirely to chartered corporations, and upon refusal to pay gold or silver on the bills or notes of the bank on demand, a penalty of $2\frac{1}{2}$ per cent. per month was thereby incurred by said corporation, and the bank's charter to be forfeited by judicial proceedings (Hotchkiss' Code, 363, 85), and a receiver appointed to convert the property and assets of the corporation into cash, and distribute the fund to the creditors. If the property and assets of said corporation were insufficient to pay the debts of said bank,

then the receiver was authorized under the Code to bring suits against the private stockholders (or the representatives of such stockholders), for the purpose of recovering from them the proportionate part of such deficiency (or ultimate liability) according to the terms of the charter.

Hotchkiss' Code, page 365, (90).

Again, bank bills or notes payable to order, or payable to bearer, shall be taken and construed by virtue thereof, due and payable to each person or persons, * * * and that person to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, &c., * * * in like manner as in inland bills of exchange.

Hotchkiss' Code, 440, (45).

This being the statute law of Georgia at the time the bills sued on bear date, said statute entered into and formed a part of the *lex loci* of the transactions, and the statute of charter and the Code then existing, defines the ultimate liability of these defendants. When the assets of the bank were exhausted, then the ultimate liability of the stockholder accrued. The corporation then no longer existed for the purposes of its institution, and its final active operations ceased.

No direct action against the stockholder accrues to pay the proportionate part of the indebtedness of the bank on his ultimate liability, until the assets of the bank are exhausted.

20 Wallace, 520, Pollard *vs.* Bailey.

Because his liability had not been liquidated, until the corporate assets were converted and applied on the debts of the corporation, and the total deficiency of the bank ascertained.

That date in this case was June 30, 1873.

11 Georgia, 497; Thornton *vs.* Lane.

In Addison *vs.* Christy, 49 Georgia 431, the Supreme Court of Georgia says: This was a suit upon an account dated January 31, 1866; suit filed March 19, 1870. The defendant plead the statute of limitations. The Judge of the Superior Conrt held, that the statute of limitations did not apply, as they were suspended by the stay laws of the state up to July 21, 1868; and therefore the statute of limitations did not run until July 21, 1868, and the jury rendered a verdict for the plaintiff.

The defendant appealed.

The Supreme Court in their ruling say: "The words of the 8th Sec. (Act March 16, 1869), as clearly apply to this case as they did to the case of Black *vs.* Swanson. That was an action that accrued after June 1, 1865. This is a contract made after June 1, 1865. Both cases are within the express words of the 8th section, and are governed by it. * * * * It was also objected that the 8th section could not have been intended to take away the benefit of the suspension acts; (that is to say that Sec. 9 of the act, March 16, 1869, as the repealing clause; repealed the stay laws referred to). No one has denied, or can deny, that it did have, and was intended to have that very effect, in all cases of actions which accrued prior to June 1, 1865. It simply said that all such actions must be brought by January 1, 1870. But the iron heel of the act of March 16, 1869, limited the right to January 1, 1870. * * * * * * * After the fullest consideration, we feel constrained to hold, that under the 8th section of the act of March 16, 1869, the provisions of the Code, as to the limitation laws therein, apply to contracts made since the 1st day of June, 1865. *Judgment reversed.*"

Thus maintaining the constitutionality and supremacy of the repealing clause, section 9, of the act March 16, 1869, as a repeal of existing laws without reference to

their title or reference to the sections of the Code repealed.

Black *vs.* Swanson, (49 Georgia, 424,) above referred to, was an action on a note dated ——, 1864. The defendant pleaded as a set-off a note made by the plaintiff January 2, 1865, payable December 25, 1865, for $400. This plea was filed June 8, 1871. The plaintiff introduced the note sued on, and closed. The defendant introduced the note plead as a set-off, and closed. The court charged the jury "that the note introduced and pleaded as a set-off was barred by the statute of limitations." To which charge the defendant excepted. The jury returned a verdict for the plaintiff. Defendant assigns as error "the plea of the statute of limitations, March 16, 1869,"

In their opinion the Supreme Court say: "It cannot be denied that there is great difficulty, if, indeed, there be not an impossibility, in construing the act of March 16, 1869, so as to make all parts consistent with each other, &c. * * * " The judge recites the act and discusses it section by section, showing the inconsistency and illegality of said act, and on page 476 says: "Again, a sort of omnibus provision, saying it matters not *whether the right of action had actually accrued* prior to June 1, 1865, or was then only inchoate and imperfect, if the contract or liability was then in existence, the limitations should take effect. Thus far it would seem that an action on a note executed in January, 1865, and due in the following December, suit must have been commenced by the 1st of January, 1870. The third section and the latter clause are certainly in their words to that effect, * * *; no right of action accrued until the maturity of the note, in December, 1865. The eighth section expressly says that such cases shall be controlled and governed by the limitation laws of the code. Those laws give the holder

of the note six years from the time the right of action accrued. We solve the whole difficulty, as far as we can, by bringing this case within the eighth section. * * * It is the last section of the act except the repealing clause; and whatever may be the inconsistencies of the other sections, there can be no doubt as to the meaning of the terms used in this. The note held by the plaintiff in error, though made before was not due until after June 1, 1865. No right of action accrued until after that date; and by act of March 16, 1869, it is controlled by the limitation laws set forth in the code."

In the foregoing cases we have the rulings of the Supreme Court of Georgia upon the act of March 16, 1869, and its effects upon contracts governed by the common law. In the case of George *vs.* Gardener the action was for the foreclosure of a mortgage made before June 1, 1865, but not due until after that date. This cause of action was held to be barred by said act. This was a common-law liability.

In the case of Black *vs.* Swanson a note made before June 1, 1865, and due after June, 1865, was held not to be barred by said act. And in Addison *vs.* Christy it was held that the repealing clause of the act of March 16, 1869, repealed the limitation laws of the code in existence at the date of the passage of the act; that the iron heel of said act of March 16, 1869, limited the right of action to January 1, 1870. It is true that these cases quoted are common-law actions, and subject to the common-law rule, and are not parallel cases with the suit at bar, founded on the statute of charters. Yet the sweeping power and effect claimed for said act of limitations (plead in this cause) may be argued as a repeal of the act of incorporation of said Planters' Bank.

If the right of action runs into the hands of the bearer of the bills, under the statute of incorporation, then, by

the ruling in the case of Black *vs.* Swanson, plaintiffs' right of action is saved in this suit, unless it is argued that the charter is repealed by the repealing clause of the act plead. No actual default or act of bankruptcy of the bank existed before it assigned—July 9, 1866. Insolvency of the corporation without default constituted no cause of action against the corporation, and constituted no cause of action against the defendant stockholders.

The bank bills, vouchers in this action, were outstanding, not dishonored, (not due,) (Hotchkiss' Code, 440, sec. 3, (45;) 6 Bacon's Abridg., 381, Stat. D, 3,) at the date of the assignment. In the language of the Supreme Court of Georgia in Black *vs.* Swanson, "the vouchers held by the complainants in error, though made before, were not due until after June 1, 1865. No right of action accrued until after that date; and by the act of March 16, 1869, it was controlled by the limitation laws set forth in the code."

Complainants submit that the present action does not come within the purview of the act as plead in the demurrers. Their right of action remains as regulated by the code of Georgia, as referred to in the 8th section of said act, and their right of action is not regulated by the first seven sections of said act as plead in the demurrer, and remains under the statute a vested right of action for twenty years, or controlled by the 8th section of said act under the code.

In Kimbro *vs.* B'k of Fulton, 49 Georgia, 419, another adjudication was had. This was an action brought on the 31st day of May, 1871, in a judicial court, on the bank bills of the Bank of Fulton against the corporation for payment. Judgment was rendered in the justice's court in favor of the plaintiff. The case was carried by the defendant, on appeal to the docket of the Superior

Court of the county. Defendant's fourth plea was the act of March 16, 1869, as a statute of limitation in bar, and said plea was sustained by said court of said county; and said ruling was assigned as error in exception to the demurrer on the third and fourth pleas in the cause. *Judgment reversed.*

The Right of Action Sustained.

In their ruling upon said act the Supreme Court say: 2d. The authorities are numerous, and almost without conflict, that the statute of limitation does not apply to bank bills, and it was so decided in the case of Dougherty *vs.* The Western Bank of Georgia, 13 Georgia, 288, and again recognized as the correct principle in 30 Georgia, 770. The reason given for such exception of bank bills from the common rule is, that they are by consent of mankind,and course of business, considered as money; that their date is no evidence of the time when they were issued, as they are being issued continually, returned to, and re-issued by the bank. Under such a state of facts it would be impossible to fix a starting point for the statute to begin to run. (See 13 Georgia, Supra. and authorities.) But if such bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the bank, and to be considered asmoney in the ordinary sense of that term, the reason for that exception ceases. They no longer have that distinctive character from other contracts which excepts them from the operation of the statuteof limitations. (See remarks of Lumpkin, Judge, 30 Georgia. 774) * *.

3d. It does not appear from the record whether the bank bills sued on in this case had lost their distinctive character, and if so, at what time. If it were prior to June 1, 1865, they then stood on the same footing as other

contracts and come within the provisions of the act of March 16, 1869. * * *.

4th. The rules of pleading in relation to the statute of limitations should be the same, both as to plaintiff and defendant. That is, as it is necessary for the plaintiff if he declares on a contract which on its face would be barred by the statute to allege the facts, if any, which would take the case out of the statute, or be liable to a dismissal of his suit on demurrer; so should a bank when sued on its bills, which are not under the general rule within the statute, show by its plea, if it rely on the statute such facts as will bring the bills within its operation, or the plea can be demurred to."

The complainants endorse both of the opinions in 13th and in 30th Georgia referred to, but deny emphatically that the conclusions of law that are attributed to them in the ruling of Kimbro *vs.* the Bank of Fulton, is correct. Complainants submit that the opinions quoted are antagonistic and repugnant to the dicta of the ruling made in Kimbro *vs.* Bank of Fulton, in the reasons given for the ruling in the latter case. In the opinion quoted, 13 Georgia, 298–9, the Supreme Court say: "They are issued (the bank bills) for the purpose of being used as money by the banks, and the State is a party to the consent that they should be so considered, because the power to issue is a grant from the legislature. Thus made money, practically, it would destroy their monetary character to apply to them, in their character of securities for the payment of money, a limitation.

If the bank is protected by a limitation, then is that protection an injury, &c. * * * * *

Nor has it (the bill) an end of life, because it is never overdue. If, as Judge STORY says, it is never overdue, no matter when issued or how often reissued, but is always an immature representative of a legal tender,

when shall the statute commence to run? Shall it be said from the time of a demand and refusal to redeem? If so, then an insolvent bank—by which I mean a bank which is unable to redeem its bills—is upon a better footing than one whose credit is good—that is to say, the former is protected by the statute, and the latter is not.

Whatever of virtue there may be in that idea, we shall not now determine, as such determination is not made necessary by this case. We determine that a bank note is not barred by the lapse of the statutory term commencing at its date, and that generally the statute of limitations has no application to bank notes."

Judgment reversed.

Complainants submit that the quotation of the authority, (Dougherty *vs.* Berthune, 30 Georgia, 774–5,) is an error or mistake of the learned Judge delivering the opinion in Kimbro *vs.* Bank of Fulton. The authority referred to reads, "Does the statute of limitation of four or six years bar the plaintiff's right of recovery in this action? We think not, most clearly. But not for the reason assigned by counsel of the defendant in error. (He insists that this court has laid down the doctrine broadly, that the statute does not apply to bank bills; and so it did. *But that rule applied, perhaps to the bank bills which continued to circulate as currency, But the bank bills in this case, had ceased to circulate as currency. They had ceased to be taken in and reissued as currency.*) But there is another reason, and, to my mind, a conclusive reason, why the statute does not apply. *This action is to enforce a trust.* No remedy for this purpose exists *at common law: But here it is given by the legislature.* Were the bill-holder to go into equity to enforce his trust, will it be pretended that the legal bar to plaintiff's claim could be interposed? Certainly not. Could the assignee of the bank, who has been put in possession of the effects of the bank to release

those bills, shield himself under the statute from the performance of his trust? No one will seriously contend for this; and if he could not in equity, and the creditor has availed himself of a common law form, as he had a right to do under the authority conferred upon him by the legislature, shall he thereby be deprived of a right which could not be taken away from him in equity? In other words, shall he be barred at law when he would not be in equity? We think not. *Judgement affirmed.*"

In this case the Western Bank of Georgia failed and made an assignment in 1841, and this cause was tried in 1859, and the validity of the debt founded on the bank bills issued and in circulation before 1841, was fully sustained and judgement affirmed; the short bar of limitation of four or six years, it was ruled, did not apply, although the bills had ceased to be a circulating medium for more than fifteen years; and the suit was to enforce at law, payment on a trust.

There is this distinction between the case at bar, and the case of Kimbro *vs.* Bank of Fulton.

In the case at bar the suit is upon the statute to enforce a trust, the liability of the stockholder under the statute as a bailer or trustee; whereas the suit in the case of Kimbro *vs.* Bank of Fulton, the action was directly upon the bills on the contract of the bank, running to the bearer of the bills. The suit was against principal and not against the indemnity liable by statute.

In the suit at bar the statute authorized the issue of the bills payable to the bearer on demand, and upon that condition broken; the liability of the stockholder on his bailment or trust accrued, and this suit is upon the statute to enforce payment from the bailor or trustee, on that condition broken.

In Kimbro *vs.* Bank of Fulton, Justice Trippe says:

"The reason given, why such exception of bank bills from the common rule of limitations is, that they are considered money; that their date is no evidence of the time when issued, &c. * * * * * * But if such bills have ceased to circulate as currency, and have ceased to be taken in and re-issued by the bank, and to be considered as money in the ordinary sense of that term, the reason for that exception ceases."

And said Justice Trippe refers to Justice Lumpkin's opinion (hereto set out, *supra*) to confirm said *common law ruling*. But complainants submit that no such ruling was made in said cause by Judge Lumpkin as claimed by said Justice Trippe. Mr. Justice Lumpkin says: "Does the statute of limitation of four or six years bar the plaintiff's right of recovery in this action? We think not, most clearly. But not for the reason assigned by the defendant in error.

He (the defendant) insists that this court has laid down the doctrine most broadly, that the statute does not apply to bank bills, and so it did. But that rule applied, *perhaps*, to bank bills which continued to circulate as currency. But the bank bills in this case had ceased to circulate as currency; they had ceased to be taken in and reissued as currency. The bank had assigned its assets more than fifteen years before that date;" and, notwithstanding that fact, Mr. Justice Lumpkin maintained the validity of the bills, in his opinion, and the court gave judgment on the debt, even though the bills had ceased to be used as currency for fifteen years before that date. His ruling was not against the bills, for the reason assigned by Mr. Justice Trippe, *but the reverse*; his ruling sustained the bills, and the right of action thereon, notwithstanding the lapse of time, and the fact alleged that the bills had ceased to be current money for fifteen years. And said Justice Lumpkin adds another conclusive reason

why the limitation on said bills did not "apply." This action is to enforce a trust. No remedy for this purpose exists at common law. But here it is given by the Legislature. "*A fortiori*," in the suit at bar, the remedy is given by the Legislature.

50 Geo., 580; Note 3; Atkinson *vs.* Keith.
3 Mason, 320; Wood *vs.* Dummer.

This is the ground of the complainants' action in the case at bar. His right of action is founded on the sovereign will; the grant of the Legislature, as vested under the statute, in conformity to the statute, and by authority of the statute. And complainants submit, that their right of action exists under the statute until divested by payment, or until the said right of action expires by the limitations in force in Georgia at the date said right of action accrued under the statute.

In Kimbro *vs.* Bank of Fulton, the ruling was correct. The validity of the bank bills sued on was sustained. But the reasons given for the ruling made are in direct conflict with the authorities quoted and referred to in the ruling; thus, the ruling says: "*But if such bank bills have ceased to circulate as currency, and have ceased to be taken in and reissued by the bank, and to be considered as money in the ordinary sense of that term, the reason for that exception ceases. They no longer have that distinctive character from other contracts, which excepts them from the operations of the statute of limitations.*" And complainants submit that all of Judge Lumpkin's decisions are in conflict with, and in opposition to, the principle set out in the above quotation, which are attributed to him. The reverse appears to be the universal ruling of the courts in Georgia, particularly 13 Georgia, 290, Dougherty *vs.* Western Bank, already referred to by Justice Trippe.

The said ruling of Justice Trippe implies that the statute rules, so long as the law is obeyed by the corpora-

tion unbroken; but so soon as the bank fails to maintain its franchise unbroken, then the statute fails to protect the rights of bill-holders under the statute. The statute then becomes dormant, obsolete, or of no effect, and the common law applies, to rule the rights of the parties affected by the failure. But, fortunately, the authorities are all adverse to any such ruling.

30 Georgia, 599, § 5 6; Hargrove *vs.* Chamb.
11 Georgia, 486, Hightower *vs.* Dozier.
18 Georgia, 420, McDougal *vs.* Belainy.
11 Wallace, 610; Hoag *vs.* Ins. Co.

The statute of charter and the code of Georgia make no such provisions in case of the failure of said Planters' Bank as that claimed in the ruling in Kimbro *vs.* Bank of Fulton would imply. The statute creating the bank, the code in existence at the date of the failure of the bank, and the rulings of the courts of the State, at the date of the passage of the act, all maintain the validity of the action in this cause; the opposite and reverse to the ruling implied in Kimbro *vs.* Bank of Fulton is the rule. No ruling by the Supreme Court in Georgia is to be found in the books to this date, barring bank bills by act of 1869.

In the case of Terry *vs.* Tubman, 92 Otto, 156, the plaintiff in error endeavored to raise the unconstitutionality of the act of March 16, 1869, plead in the cause as an act of limitations. The assignment of error raised the unconstitutionality of said act as a bar to plaintiffs' suit, and it was on that ground alone that said writ of error was prosecuted. But this court refused to consider the unconstitutionality of said act in that cause on the error assigned for the following reasons: "He has however demurred to defendants' plea, which averred that the same facts existed, and justified a commencement of a suit on the 1st day of June, 1865; in other words, that

his right of action had accrued prior to June 1, 1865, and that the same is barred by the statute quoted. * * * If his complaint is good the plea is good. If the plea is bad the complaint is bad. A demurrer seeks the first fault in pleading; and it is with the plaintiff the first error exists, if error there be."

And this Supreme Court did not consider or pass upon the unconstitutionality of said act in said cause. Therefore the complainants in this action pray the mature and deliberate consideration of that question by this court, as raised by the pleas and evidence in this cause and upon the arguments hereto submitted.

In Cherry vs Lamar, The Supreme Court

The act of March 16, 1869, being in restraint of right, penal in its nature, it ought to be construed strictly. Yet we find in the adjudicated cases in the Supreme Court of Georgia that the rulings and constructions of that court upon said act are not uniform and consistent; the cause of justice and equity being outraged by a strict construction of *said act*, that court has varied its meaning and changed its application in different causes. Thus, in George *vs.* Gardner, they have given a strict construction to the act, and decided that nine months and fifteen days was a reasonable time allowed by the statute for the plaintiff to commence and enforce his rights of action before a bar attached by said statute as an act of limitation; that said act did not destroy plaintiffs' rights; *it only defeated his remedy.*

In Black *vs.* Swanson, an opposite ruling was made, said court holding that a strict construction of the act plead defeated the equities in the cause; and a strict construction of the act was ignored and ruled upon adversely. In Addison *vs.* Christie another varied ruling was had upon said act. In that case it was held that the act of March 16, 1869, repealed the stay laws of the

The suit of Jones vs Dubose was founded on the notes of the Bank of Georgia, "that and if the bills (would be barred if it would be quite immaterial in a suit founded on a judgment, &c.

State in existence at the date of the passage of said act, and said act thereby barred the plaintiffs' right of action in that cause. In Wright *vs.* Yitroner, another case of varied ruling and interpretation of said act occurs.

In Atkinson *vs.* Keith, (50 Georgia, 580, note 3,) it was held that a right of action was not barred, although the right of action accrued during the time limited in the act of March 16, 1869.

In Aiken *vs.* Freeman, (49 Georgia, 51,) a different ruling was held on the act of March 16, 1869, as a statute of limitation strictly construed. And in 53 Georgia, 42, McLaren *vs.* McCarty, the same question was re-argued and re-heard by the Supreme Court of Georgia, and the following language used by the court: "That while the first seven sections of the act of 1869 only apply as to rights of action accruing before June 1, 1865, yet the last section covers all cases where the right of action accrued since 1865. But we are clear that there is nothing in the last section broad enough to cover a *fi. fa.* and to set the statute running as to it. *The iron heel of the act* of March 16, 1869, failed to receive a strict construction in these cases. Complainants submit that there is nothing in the act of March 16, 1869, broad enough to cover bank notes and to set the statute running as to their bills in this suit, or their right of action in this suit, under that act. for the debts of the Bank.

In Kimbro *vs.* Bank of Fulton we have a ruling directly upon bank notes. The bank notes sued on were issued before the war by a bank that collapsed at the close of the war. Suit was brought in 1871 against the corporation. The defence was the act of March 16, 1869, plead as a statute of limitations. The Supreme Court ruled that the bills were not barred, and maintained the action. The reason assigned for said ruling was that the

defendant, by his plea, had failed to show a defence that came within the purview of the act plead; and the ruling in the cause ruled upon the common law, but did not rule upon the statute, and maintained the plaintiff's action as a common-law right of action on the contract of the corporation, running to the bearer of the bills.

Complainants submit the effect of the ruling was correct, but deny that the theory of the ruling was true. In the rulings, the "dicta," of the court convey the idea that the act of March 16, 1869, was a repeal or modification of the act of charter, or that, upon the insolvency of the bank, the act of charter failed to protect the vested rights of the holders of the bills. In other words, a vested right under the charter of the bank was annulled and repealed by the act of March 16, 1869, if the fact was disclosed to the court by the pleas in the cause that the insolvency of the bank existed, or discredit of the bills existed, within its purview; that a default of the corporation being shown to the court, then the statute of charter ceased to be operative, and the act of March 16, 1869, controlled the action.

To all of which contradictory and illegal rulings by said Supreme Court of Georgia complainants submit that they are not bound.

18 Wallace, 546; Boyce *vs.* Tabb.
8 Wallace, 575; Butz *vs.* City of Muscatine.
4 Wheaton, 206–7–8; Sturgis *vs.* Crowningshield.

That complainants rely on their bill and the proofs thereto admitted, and their assignment of errors to this court, relying upon the protection of their right of action under the statute of charter of said bank, as guaranteed by the Constitution of the United States, and as protected from invasion by the Constitution and Code of Georgia.

Complainants submit to this court that they have al-

leged facts in their petition which take their right of action out of the purview of the statute of March 16, 1869, if said act is held to be constitutional and operative.

But complainants maintain said act as plead to be unconstitutional and void as a bar to complainants' right of action vested under the statute of charter of the Planters' Bank.

The fact that the vouchers of debt sued on are bank notes does vary the law:

1st. Statute of Charter; Princess' Digest Laws Geo., 116–9.

2d. Constitution of Geo., Art. 1, Sec. 26, 32; Art. XI, Sec. 4–5.

3d. Code of Georgia, 1867, §§ 2749, 2865, & Pre. Pro. 4, § 6.

4th. Constitution of U. S., Art. 1, Sec. 10.

5th. 13 Georgia, 288; Dougherty *vs.* Western Bank.
30 " 599, § 5, § 6; Hargrove *vs.* Chambers.
30 " 774–5; Dougherty *vs.* Berthune.
6 Cranch, 135–6–7–8–9; Fletcher *vs.* Peck.
8 Wallace, 60–4; Furman *vs.* Nichols.
16 Mass., 271–4; Foster *vs.* Essex Bank.
52 Georgia, 525; Branch *vs.* Mechanics' Bank.
53 " 511; Dobbins *vs.* Sibley.

Complainants submit that the unpaid subscription of the stockholders to the capital stock of said bank did not exist as an asset of the corporation in hand and as a part of its property, and was not transferred by the bank to said assignee to be paid out and distributed to the creditors of the bank; that the suit of the Assignees *vs.* McNish *et al.*, referred to, was for the purpose of settling that trust; and as the unpaid stock was not a part of that trust, the question of the right of action for the unpaid stock did not arise, was not adjudicated or passed on in

that action, which was for the closing and determining of a trust. Complainants submit that said question cannot be *res adjudicata* here, because that question has not heretofore been tried in any court.

93 Otto, 40; Terry *vs.* Abraham *et al.* The court say: "We are of opinion that the assignment did not carry this statutory liability. * * * * * * Complainants took no steps to have the unpaid stock collected, and it did not pass by the assignment."

That by force of the first seven sections of the act of March 16, 1869, complainants' right of action to enforce this suit is barred, although his right of action did not accrue until after 1870; for in the sixth section of said act it is provided, "that the limitation shall take effect in all cases mentioned in this act, whether the right of action had actually accrued prior to June 1, 1865, or was then only inchoate and imperfect, if the contract or liability was then in existence."

That the 3d and 4th sections of said act bar actions where merely the contract was made, or for the rights according to individuals or corporations under the statutes or acts of incorporation, or in any way by operation of law, &c., * * * * * prior to June 1, 1865, although the action had not at that time accrued and may not have accrued until the action was barred.

The 5th section of the same act carrying out the same view in relation to guardians, trustees and personal representatives, provides that when the management or investment was made prior to June 1, 1865, although the cause of action may not have accrued before the 1st day of January, 1870, yet the action shall be barred at that date.

This is the only legitimate construction that can be placed upon these several sections; and what is lacking

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This is the only legitimate construction that can be placed upon these several sections; and what is lacking

in the first five sections to carry out this view is fully made up and supplied in the sixth section, which specifically refers to and embraces the preceding five sections and provides: that in all cases recited in the previous sections the causes of action shall be barred unless brought by January 1, 1870, if the contract or liability was in existence on the 1st day of June, 1865.

Complainants submit that the first seven sections of said act are repugnant to section eight, or the last part of said statutes; and if the latter part of a statute is repugnant to the former part thereof the latter part shall stand, and so far as it is repugnant to the last section of the act the last section ought to repeal the former part of the act, because it was the last agreed to by the makers of the statute. If the proviso of a statute be directly contrary to the purview of the statute the proviso is good, but not the purview, because it speaks the latter intentions of the legislators.

Bacon Abridg,, Title Statute, (I.), 2.
Fitzgibon 195, Atty. Genl. *vs.* Gov. of the Chelsea W. W., 1 Wilson Works, Eng., 460.

The new code of Georgia, adopted by the 8th section of said act March 16, 1869, for all rights of action arising after June 1, 1865, gives complainant a vested right of action for 20 years and says expressly, "in which the right of action of the liability has accrued or the contrast has been made since the 1st day of June, 1865, shall be controlled and governed by the limitation laws as set forth in the revised code adopted by the new constitution of the State." This last section eight being the last part of said act made by its makers (except the repealing clause) and being found repugnant to the first seven sections of said act, the last section should stand as a valid act, and the first seven sections should be considered as repealed thereby, because section eight is in harmony

with the act of charter of the bank, (but the first seven sections are repugnant thereto,) and in conformity to the *lex loci*, in existence at the date of the issue of the bills, and it is in "*pari materia*" with the new constitution adopted July, 1868, before the passage of said act. Section eight agrees with the preamble of said act and with the rulings of the Supreme Court of Georgia in the cases of Black *vs.* Swanson, 49 Georgia, 424, and McLaren *vs.* McCarty, 53 Georgia, 42; Angel on Limitations, §22, note 3; and as stated by the Supreme Court of Georgia in Kimbro *vs.* B'k of Fulton, "the authorities are numerous and almost without conflict that the statute of limitations do not apply on bank notes," and although the "dicta" used was of doubtful and evasive import in that opinion, yet the fact remains of record that the bank bills were sustained on a common law ruling, on a common law action. The contract in the bank bills running from the corporation to the bearer of the bills.

The demurrer shows that the act as plead is retroactive and retrospective; that the act as plead intervened to cut short the time allowed in the code from 20 years to 17 months, and gave a defence to the defendants that did not exist at the date alleged that the right of action accrued.

Complainants submit, accepting said demurrer to be true as plead; then said act is repugnant to the constitution and code of Georgia in force at the date of its passage as interpreted by its own showing, "that said act intervened to cut short the limitations of a statute already attached under the code, and destroyed a right of action that existed for the collection of a debt not otherwise barred by the laws in force at the date of the passage of the act." And therefore said act is repugnant to the Constitution of the United States, Art. 1, sec. 10.

10 Georgia, 190; Winter *vs.* Jones.

The first seven sections of the act are not in conformity to the preamble, but take, within their scope, all of the contracts and rights of action known to the law; they assume to control and regulate the delegated powers of the constitution and code of the State as adopted before its passage, by creating a bar to all suits on contracts or rights of action in existence before June 1, 1865, (choate or inchoate) if not sued on before January 1, 1870.

That said act plead, did not limit all contracts and causes of action then in existence, but only those that were in existence before June 1, 1865, (a class legislation). And the proviso of the act provided: that all contracts and causes of action made and accrued since June 1, 1865, should be controlled by the limitations, laws of the code, (thus limiting the contract or right of action made or accrued in May, 1865, to nine months and fifteen days after its passage; and limiting the right of action made or accrued in June, 1865, to nineteen years after its passage,) under the same act.

Complainants object to the plea of the demurrer as plead in this action.

6 Arkansas, 266; Dickerson *vs.* Morrison.
2 Greene (Iowa,) 243; Gordon *vs.* Mount.
2 Greene (Iowa,) 244; Hinck *vs.* Weatherford.
6 Smeedes & Marshall, 521; Nevitt *vs.* Bank of Port Gibson.
10 California, 307–8; Scarborough *vs.* Dugan.
11 Illinois, 54; Thompson *vs.* Alexander.
15 B. Monroe, Ky., 19–20–25–6; Slack *vs.* R. R. Co.
23 Mississipp, 269; Boyd *vs.* Barringer.
11 Mass., 406; Holden *vs.* James.
14 Wendel, N. Y., 656; Jackson *vs.* Brooks.
3 N. Hamp., 482–3; Woart *vs.* Winnick.

12 Louisiana, 728; Deal *vs.* Patterson.
17 Wallace, 599; Sohn *vs.* Watterson.
1 Wilson Works, Eng., 460.

The courts do not sit to make laws; but sit to expound the law as made, and if found unconstitutional will so declare them. Art. 1, section 32, New Constitution of Georgia.

HARVEY TERRY,
Complainant.

Execution may be issued on a judgment within 7 years after it is entered in Georgia before it becomes dormant. The judgments in evidence of debt in the present action were not dormant at the date of suit.

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3 N. Hamp., 482–3; Woart *vs.* Winnick.

Supreme Court of the U. S.

HARVEY TERRY, et. al. Appellants,
And
EDWARD C. ANDERSON, et al, Appellees.

Reply of Appellants to the arguments of Appellees.

The appellees' first ground of defense in this argument is, the statute of limitations of 1869. The complainants refer to the plaintiffs' argument in the case of *Terry* vs. *Coskery*, filed herewith, as a part of his reply in this argument. Said reply, it is thought, is a full and complete answer to this argument, upon that point, except as to some minor differences of fact between the two causes of action.

In the case at bar, the bank ceased to pay its bills in February, 1865; but the complainants do not base that fact as a cause of action in this suit. That fact was to show that the bank was discredited, and therefore its stock was unsalable and not transferable after that date; it ceased active operations as a bank, but no act of bankruptcy or actual failure occurred until the assignment in 1856. No other act of bankruptcy is alleged or shown in the pleadings.

The bank ceasing to do business, is not given as a cause of action against the stockholders under this statute; neither was the liability of the stockholder for the

unpaid subscriptions for their shares of stock due at that date, because it had never been called for by the bank. Nor has said unpaid subscription for stock ever been called for until the demand made in thic action. It has remained a subsisting trust; it has not included in the assigned assetts, and did not pass to the assignees. *Terry* vs. *Abraham*, 93 Otto, 40.

Subsisting trusts cognizable only in a Court of Equity, are not within the ordinary statutes of limitation.

Code of Georgia, 1861, S. .

Cherry vs. *Lamar*. Manuscript opinion, January 7, 1877.

Upton Association vs. *Tribitcock*, 91 Otto, 55.

Suits on the judgments, vouchers in this action, were instituted by the assignees of the bank, on behalf of the bank and representing the interests of the bank. The assignees personally, had no interest in the action; the rights adjudicated were the rights of the bank on one side and the rights of the bill-holders on the other. It was in equity a suit between the bank and the bill-holders, and no other interests were involved or adjudicated, and these rights were passed upon by a court and jury competent to try the cause.

It is true that complainants did not set out the record of said suit of said assignees vs. said stockholders, as the appellees suggest that the complainants ought to have done, as a part of this complaint. To have done so, embracing the affairs of an extensive bank and a suit against five hundred and sixty defendants, would have made a record larger than Webster's Dictionary, at a cost of thousands of dollars, and for the court to require the production and appendage of said record, as a part of the complaint in this action, would practically be, to defeat the complainants' right of action. The record may be necessary for the proofs to be made before the

master in the cause, and can be so exhibited without cost before him.

Upon the demurrers of the appellees being filed, the complainants below amended their bill, stating that the defendants held said stock at the date of the issue of said bills (see Record, folio 59); and the appellees are mistaken in that branch of their argument.

It is submitted, that it is not a material fact in this action to state the exact date of failure of the bank in the complaint, or to state the exact number of shares held by each defendant, nor the exact sum due from each defendant, and the date at which each defendant acquired his stock—these are matters of law and fact combined, and if we establish the fact of the failure of the bank, then these exact proofs follow subsequently; being unknown to the complainant, they are the legitimate subjects of proof before the master.

The appellees are technical in their argument, and tell us that the stockholders are bound "in the same manner as in ordinary commercial cases, or in simple cases of debt," and argue from this point that the stockholders liability is a common law liability, or subject only to the rules of common law. But such is not the law. Such would be the law as to the bank, except as modified by the statute; but the bill-holder has no right of action whatever against the stockholder, except by the record of the statute as it was enacted. Any individual may give his prommissory note (a common law liability) and secure said debt by mortgage on real estate; while the note is subject to the statute of limitations in six years, yet the debt may be collected on the mortage within twenty years. The *jus ad rem* is secured for the performance of the contract in the record, even though the note be barred, yet the debt remains unpaid and the liability subsists in consequence of the record being a specialty.

8 Georgia, 326—*Eakins* vs. *Edwards*;
53 Georgia, 38-9—*Hardeman* vs. *Battersby*;
1 McAllister, Cal., 498-504—*Sparks* vs. *Pico*;
Code of Georgia, 1873, § 3,096.

So is the stockholder held to perform the condition imposed by the record in the statute.

This is a record of the highest dignity, imposing a trust upon condititon (by the user of the franchise) by acts of the defendants.

They received the estate *cum onore*; they are liable under the record; not as under the common law of partnership, each stockholder liable for the whole debt of the corporation, but the liability is limited to the terms prescribed in the statute.

The appellees say, "There may be special circumstances which will enable the holder of a promissory note to proceed in equity against the maker; * * * but no such circumstances appear in this case. The fact that the complainants had other demands of such a nature that they could only be prosecuted in a Court of Equity, furnishes no reason for joining with them these which only can be prosecuted in a court of law"—citing *Pollard* vs. *Bailey* as an authority in support of their argument. But appellants submit that the liability in the case cited is for proportionate part of the debts of the bank; while in the present statute the liability is "in proportion to the shares held * * * for the ultimate redemption of all of the bills or notes issued." If an action for the ultimate liability of the stockholder would not lie in Pollard's case until the corporation was exhausted, we fail to see how an action could have been maintained against the stockholders of the Planter's Bank before the assets of the bank were exhausted. And if the ruling in *Pollard* vs. *Bailey* is the correct principle, then no right of action existed against the stockholders

until the assets of the bank were distributed, June, 1873; and complainants are not within the purview of the act plead, by the defendants own showing. And if complainants failed to sue the bank and to take judgment as against the corporation, they have shown that all of the property and assets of the corporation in the hands of its assignees had been distributed, and nothing remains to be collected from it by suit—the fact is that said corporation remains without legal representative officers, or organization, since the discharge of said assignees, even though the legislature did not accept the surrender of said charter.

But the complainants were under disability to sue the bank on account of the stay laws in existence until July, 1868, and at that date the assignees were administering the fund, exhausting the corporation and performing by jurisdiction, already had, the very objects of a suit? Why then sue the bank; a judgment against the bank is of no avail except to determine the sum due, and that was properly done by the Superior Court of Chatham County, up to the date of said judgments; and the master in the cause will properly adjust the re-remaining debts. And the code itself provides (in Sec. 3096 quoted,) the proper remedy in this action.

But we have been referred to *Adams* vs. *Davis*, 47 Georgia 339. As a ruling in support of the Constitutionality of the act of 1869; this was a common law action against the indorser on a note made in August, 1863, and due in December, (1863) with a credit thereon, made in January, 1864. The action was commenced in September, 1871. In this ruling it is held that the act of 1869 rules the code, and that the action was barred by it. And the Chief Justice in a dissenting opinion, gives a good healthy argument why said act of 1869 should not prevail, (opinion page 344) to wit:

"There is no negative words in the act of 1869; there is nothing in the act of 1869 in conflict with that right, and therefore the repealing clause of that act does not affect it. * * * * * * If it is, it is by implication only, and the Courts do not favor the repeal of statutes by implication; construing the statutes of limitation together, including the act of 1869, there is nothing in it which repeals, or is in conflict with that section of the code. * * * All the acts can stand, and have the effect intended. * * * * And there are no words in that statute (1869) which negative or are in conflict with that right, and not in conflict with it; the repealing clause cannot have the effect to take it away from the plaintiff in this case, (opinion on page 344,–5)." *And* this although a dissenting opinion, we believe to be the key note of the principle insolved in the action at bar. There is no direct repeal of the charter of the bank, or of the code of Georgia in existence at the time that the rights of the complainants in the bill attached, and repeal by implication will not avail.

We are cited to the case of the *Moravian Seminary* vs. *Atwood*, 50 Georgia, 382. This action was founded on an account contracted in 1862. The debtor died. The record does not disclose the date of his death. Administration was granted in September, 1869. By the code administrator are exempt from suit for twelve months after qualification. The terms of the act of 1869 would barr the right of action by January 1st, 1870.

In this case it was held, that a part of the nine months had run before the death of the debtor, and then by adding the remaining time of the limitation to the date of the qualification of the administrator, gave the date that this action was barred. In other words, the Court held, that the plaintiff had the full niue months without disability in which to bring his action.

If we apply this principle to the present case, our rights of action are safe under this rule. The assignees were discharged June 23, 1873, and this action was filed April 6, 1874, and services made within the time limited in the act; under this common law ruling of the application of the act.

For a further discussion of this branch of the case, I refer to my reply to the defendant in error in the case of *Terry* vs. *Coskey* herewith filed.

There is this distinction to be made between all of the authorities cited by the defendants and the case at bar. ☞The cases referred to by defendants are all common law cases, while the action at bar is a right of action on a record. The cases referred to are cases upon the simple contract; while the action at bar is not upon any contract between the parties to the action, but the right of its enforcement, and the duty of the performance, is in the statute enacted.

In the authorities cited by the defendants, it is the common law that bound the defendant to the performance of their contracts. But in this case at bar, the making and issuing of the bills by the bank, is not (properly speaking) the contract of the bank, but it is the condition expressed by the sovereign will; the grant of the estate by operation of the law, and by the authority of the law recorded in the statute.

It was not the the fact that said bills were issued from said bank, that made them valid, and made the defendants liable, but it was the fact that the right of user of said corporate franchise, was conveyed by the statute.

The corporation itself is but the mouthpiece of the law, that created the legal parts of the estate, in the condition, tenor, and form required in the act; and by the user of the corporate powers as granted in the law, the defendants issued, circulated, and produced in existance

(not the contracts of the Bank, but) the estate granted upon condition; and having availed themselves of the benefits of the law and received the value of the estate circulated; they are (and should ae) subject to the liabilities created by the law for their profit, use, and advantage. Not upon any contract made between the parties to action, but these defendants are liable and should make performance of the liability enacted in the statute. They received the value of the estate; they ought to be liable for it. If the statute is of record, then the liabilty is a matter of record. If the statute is not a record then no liability exists againts the defendant in this action.

HARVEY TERRY,
One of the Complainants.

Supreme Court of the U. S.

HARVEY TERRY
vs.
THOMAS W. COSKERY.

Plaintiff in Error's Reply to the Arguments of Defendant in Error.

The defendant in error says: "This Act (March 16, 1869,) is not in conflict with the Constitution of the United States," citing as authorities—

McElymole vs. *Cohen*, 13 Peters, 327;
Ross vs. *Duval*, 13 Peters, 64;
Bacon vs. *Howard*, 20 Howard, 25;
Sohn vs. *Watterson*, 17 Wallace, 598;
Bronson vs. *McKinzie*, 1 Howard, 315;
Bank of State of Alabama vs. *Dalton*, 9 Howard, 527.

In *McElymole* vs. *Cohen*, the question was, "whether a judgment obtained in South Carolina, which by law of Congress of May 26, 1790, is made a debt of record, not examinable upon its merits, but when transferred into Georgia it did not carry with it the force of a judgment, in Georgia, upon which execution could be issued and enforced against persons and property in the latter State. But to give it the force of a judgment, in Georgia, it must be made a judgment there; and can only be executed in Georgia as the laws of Georgia permit."

The question of law involved in this case is one of comity between the several States, under the laws of the United States, and is determined by the statutes of the

United States and the *lex fori* of the action. The suit at bar is brought on a statute of Georgia, involving the *lex loci* and the statutes of that State alone. It is true it was held, in this case cited, that "the statutes of limitation in Georgia could be pleaded to a transcript of judgment obtained in South Carolina; but this decision involved only *the laws of the United States* and the *lex fori of the action*; while the present action involves only *the local laws of Georgia and the lex loci of the transaction.*

We cannot go to the laws of the forum to govern the laws enacted by the Legislature; and, it is submitted, that the authority cited does not apply to rule this action.

Our action is brought on the statute, plainly conveying the right of action; and said right of action is clearly admitted by defendant's plea to have existed before June, 1865, and the question here raised is, Was that right of action barred by subsequent legislation of said State? The plea as to the remedy in both cases is fully conceded, but in the former case the Supreme Court held that the *lex fori* would prevail; while in the present action the *lex loci* and the statutes of the State govern the cause.

91 Otto., 411–12–13, *Scudder* vs. *Union Nat. Bank.*

We do not ask exemption from any law in existence at the date of the transaction, for with the laws then of force our right of action is complete. We seek to maintain the *lex loci*; whereas, in the case cited, the *lex loci* was not brought in question, and only the *lex fori* disputed and adjudicated.

In *Ross* vs. *Duval*, the question was as to the power of the Legislature of Virginia to regulate the time for issuing executions on judgments. In that case the Supreme Court say—"It is a sound principle, that where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act; and the time

yet to run, being a reasonable part of the whole time, will be considered the limitation, in the mind of the Legislature, in such cases." In this case cited the judgment had run only one year, still having nine years to run before execution was barred on it by the act. In the case at bar, if the right of action had accrued at all before the passage of the act plead in bar, it had only run about nine months at the date of the passage of the act plead; and the right of action in the present suit was shortened some nineteen years (see plaintiff's argument, p. 56), if the debt sued on was due by the defendant at that date. The bank's bills, vouchers of the debt of the bank, may have been due by the bank at that date; but that fact is quite immaterial in this action. (*Cherry* vs. *Lamar*) the debt of the defendant remained unpaid at that date, and could not be discharged by subsequent legislation of said Legislature, under the present constitution.

Constitution of Georgia, 1868, Art. XI, Sec. 4–5;
Code of Georgia, 1867, §§ 1671, 1673, 1682, 1685, 1688;
54 Georgia, 404, *Central R. R.* vs. *State*;
6 Cranch, 135, *Fletcher* vs. *Peck*;

and the statute of charter is the evidence of the indebtedness of the defendant.

The preamble to the act plead in bar—the key that opens the minds of the Legislature, to show the law intended to be enacted—fails to show any intention to repeal said charter, or annul or bar the right of action under said statute, and repeal by implication (cannot be made) will not avail.

Preliminary Provisions of Code of Georgia, §§ 4 and 6.

But if plaintiff's right of action was for the ultimate liability, as in *Pollard* vs. *Bailey*, and as set out in the charter, then no right of action accrued to the plaintiff until June, 1870, the date of judgments shown. And

the rule laid down, and referred to in *White* vs. *Hart*, 13 Wallace, 654, and *Cherry* vs. *Lamar*, would be the rule here.

In the case cited (*Ross* vs. *Duval*), the question was as to the regulation of executions issued (on judgments then in existence) subsequent to the passage of the act in question. The question of corporate rights vested under a statute, and the liability of trusts and trustees for the performance of said trusts, are not raised in either of these opinions; yet these authorities will not sustain the defendant's plea. These opinions refer us to *Lewis* vs. *Lewis*, 7 Howard, 779, where the Supreme Court held that the plaintiff is entitled to the full time of the running of the statute of limitations that existed at the passage of the act.

Nothing could intervene to cut short the running of the limitations attached at the date that the right of action accrued.

Lewis vs. *Lewis*, 7 Howard, 799.

And the plaintiff's right of action, therefore, falls within the regulations of the Code of Georgia, and that regulation gives his right of action a validity of twenty years.

See Sec. 8, Act of March 16, 1869, Code of Ga., 1867, § 2865.

In *Bacon* vs. *Howard*, 20 Howard, 25, the question was, "Whether the right of action was barred on a foreign judgment in four years in Texas." Held, that the Constitution of the United States does not restrain the right of each State to legislate the remedy on suits on judgments obtained in other States.

In *Sohn* vs. *Watterson* 17 Wallace 599, cited as an authority against us, the Court say; "A statute of limitations may undoubtly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend

upon the language of the act, and the apparent intention of the legislature to be gathered therefrom. * * * But if an action accrued more than the limited time, before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such actions at once. It will be presumed that such was not the intentions of the legislature; such an intent would be unconstitutional. To avoid such a result and to give the statute a construction that will stand, Courts have given it a prospective operation. In doing this, three different modes have been adopted by different Courts. One is to make the statute apply only to causes of action arising after its passage. * * * * * *

Another rule is, to construe the statute as applying to such existing actions, only as have already run out a portion of the statutory time, but which have a reasonable time left for prosecution before the statutory time expires. * * * * * * * *

A third construction is that which was adopted by the Court below in this case; * * * It was substantially adopted by this Court in the cases of *Ross* vs. *Duval*, and *Lewis* vs. *Lewis*. * * * * The question is, says "Chief Justice TANEY," from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided."

The act of 1869, plead as a bar, is a peculiar act, seldom found on the statute books. It purports to be an act to limit accounts; yet, in the body of the act, it takes in every conceivable liability under the law, and the last section, 8, declares that all cases which have arisen on the right of action, or liability accrued, or the contract, has been made since June 1, 1865, shall be controlled by the code of Georgia.

From what time is the limitation to be calculated?

From the date of the insolvency of the bank, as plead. It is possible that the bank never was solvent; and insolvency is not given as a cause of action against the corporation. The right of action against the corporation accrued upon the failure to pay on demand. The first failure, or act of bankruptcy shown, is the assignment of the bank in 1866. But the right of action of the plaintiff did not exist at that date. His right of action against the defendant did not exist on the bills of the bank, and if the plaintiff had sued the defendant on the bills of the bank for said stockholders ultimate liability before the assets of the bank were exhausted, he could have been non-suited on his action, as in Bailey's case the action did not lie until the assets were exhausted as shown in this petition, *Pollard* vs. *Bailey*. That date is shown to be June 23, 1870, by decree of judgment against the bank and assignees.

But how does the act of 1869 get jurisdiction and apply to bar the present action. It certainly does not do so by direct legislation contained in the act, strictly construed. The act fails to set out that it shall be a bar to the remedy of any right of action accruing under statutes of the State, then in existence, for the protection and redemption of bank notes circulated as money; and said act fails to cite or quote any particular act or statute to be repealed by it; and if the 3rd section is held to do so by implication, then said act is clearly unconstitutional under the authority of *Sohn* vs. *Waterson* just cited; and it is clearly unconstitutional under the constitution of Georgia then in existance. Art. 3, Sec. 6, Par. 3. Preliminary provisions of code, section 4 and 6. Said act does not prescribe for the future, it only acted on past transactions, to bar the remedy on vested rights, then in existence at its passage; but did not bar the remedy on rights of actions that were made or accrued after its passage; such legislation cannot be made under the Constitution

fo Georgia, and jurisdiction of the act to bar this action cannot be made by implication.

But what was the intentions of the legislature? Have they indicated any intention in said act to bar the rights of action of the holders of bank bills for the debts of the creatures of their own creation? In what part of said act is it expressed? Which is the act repealed by it? *None.* Then if no repeal is set out in the act, nor any law described to be annulled by said act, the powers of the legislature delegated by the constitution under which they acted, did not convey to said legislature the authority to create any bar to the remedy of plaintiff's right of action, as plead in this cause. They are prohibited from doing so by the constitutional provisions shown in this argument; but the act itself shows no intention to do so, and the plea only raises that application of the act by implication, and not by the words themselves. This fact is shown by the ruling of the Supreme Court of Georgia. In the case of *Addison* vs. *Christy*, 49 Georgia 433, the Court says: "It was also objected that the 8th section could not have been intended to take away the benefit of the suspension acts.

No one has ever denied, or can deny, that it did have, and was, without all doubt, intended to have that very effect in all cases of actions which accrued prior to June 1, 1865. *It simply* said "that all such actions must be brought by January 1, 1870." Implication is clearly and fully shown in this ruling. But plaintiff submits such ruling is not law, and cannot be made law under the present constitution of Georgia. And the plea plead in this action is clearly a plea by implication and not by the words of the statute.

But, even admitting the plea to be true, as plead, the plaintiff in error was not within the ~~provision~~ of the act plead; his right of action did not accrue for the ultimate liability of the defendant, until the assets of the bank

were exhausted June, 1870. (The same as Pollard's case.) And the law had expired by its own limitation before the right of action arose; and to apply the act as plead, (if we admit the plea to be true—but we deny the plea,) then the act is clearly unconstitutional. *Sohn* vs. *Watterson*. The plaintiff pursued his equitable remedies for the collection of his debt, so long as that remedy was available, and when the assets of the bank were exhausted and the liability of the defendant liquidated by that process, then the plaintiff resorted to his remedy at law, crediting the defendant with the proportionate sum collected from the corporation.

But the plaintiff assumes another ground of defence to said plea. The plaintiff is a non-resident of the State of Georgia. The bank bills—vouchers of the debt sued on, came to the plaintiff subsequent to the year 1870, for value. The bank's charter existed and continues of full force. The right to circulate and receive said bank's bills continues for the time that was enacted in the charter. And as to the plaintiff, no right of action accrued to him against said defendant, stockholder, until he was the bearer of the bills: and he received his bills subsequent to 1870; subsequent to the date that said act, plead in bar, expired by its own limitation.

This fact is proved, (Record, folio 94), and stands admitted. (Folio 89.) At that date, (if charter existed at all,) plaintiff had a vested right of action for twenty years.

But here the defendant interposes his plea, and says, "your right of action commenced in 1865, by the insolvency of the bank." But insolvency of the bank does not constitute a cause of action against the defendant, under the statute. And it is submitted, that unless insolvency of the bank did constitute a cause of action against the defendant, then said plea cannot be true, and is of no avail and void: but for the purposes of this

argument, concede that plaintiff's right of action accrued as plead,—before June, 1865. And what is the effect of it? Plaintiff then had a vested right of action, as a non-resident for twenty years. The stay laws existed of force until July, 1868. And under the defendant's own showing, the plaintiff had only seventeen months and ten days in which to enforce his right of action, if he had held the bills. And the plaintiff's right of action was decreased from twenty years to seventeen months and ten days time, by the act plead.

The plaintiff, a non-resident, holding vested rights, secured by a trust, without the sitz, and before the plaintiff comes within the sitz or forum, he is barred by an act expired by its own limitation. This effect cannot be given to the act.

Wharton's Conflict of Laws, Secs. 377*a*, 378, 379.

The purview of the act plead, extended only to 1870. How, then, was the plaintiff within its purview, in 1872, except by repeal of the charter? And that has not been plead.

If the plaintiff came in possession of his vouchers of debt, in 1872, under a valid law of that date, "from what time is this limitation to be calculated? It would seem clear, (upon principle,) that it must commence when the cause of action is first subjected to the operations of the statute, unless the legislature has otherwise provided."

Sohn vs. *Watterson*, 17 Wallace, 600.

Has the Legislature of Georgia otherwise provided in the act plead? Has the legislature in any act declared the circulation and passage of bank bills to be illegal and void? Not so. But the public policy of the State of Georgia has always been to legalize, encourage, and protect bank issues beyond any other securities. And the presumption of law is, "not that the legislature intended to in-

clude bank bills in the act of 1869, but upon the principle of *expressio unius, exclusie alterius*, excludes such a construction of the act. Besides the fair and reasonable construction of the Act itself, the constitution of Georgia forbids the enactment of such law, as plead by defendants. It is unconstitutional and void as a bar to the present action, under the Constitution, if the legislature intended to make it such; and the legislature must be construed to mean what they plainly say.

Article XI, Section 4 and 5.

Article III, Section 6, Paragraph 3.

But again: At what date was the cause of action first subjected to the statute? The bank's bills—vouchers in the action—came to plaintiff and were protested in 1872, and the plaintiff contends that no default as to these bills occurred until the date of demand and protest. Certainly no actual default or act of bankruptcy was committed by the bank until the assignment of the bank in 1866. And if this Supreme Court holds that the bills came within the statute at that date, then, under the ruling of the Supreme Court of Georgia, in *Addison* vs. *Christy*, 49 Georgia, 432, this action falls within the 8th Section of said Act, and is ruled by it, or rather, it is ruled by the Code of Georgia, and plaintiff's rights are saved under the Code.

There is no defence that the debt sued on is illegal or that it accrued to the plaintiff before he was the bearer of the bills; and the purview of the Act plead only extended to January 1, 1870. Wherein is the plaintiff subject to a law, expired by its own limitation, before he comes within the sitz? And the defendants plea must fail on that ground. The plea is not broad enough to cover the cause of action as stated in the petition.

No time is given wherein plaintiff could enforce his right of action, and no evidence of the defendant has

been given to show that the petition is untrue. The petition stands unimpeached—and for the purposes of this suit, it is true, the defence must fail.

7 Howard, 787, *Lewis* vs. *Lewis*;

15 Howard, 421, *Murray* vs. *Gibson*.

The cited authority of *George* vs. *Gardner*, to sustain the constitutionality of the Act of 1869, is a ruling of the Supreme Court of Georgia upon the common law, and it is not a ruling upon a right vested under a statute secured by a trust. In that ruling the Court use this doubtful and uncertain language:

"The Act of 1869 is a general law, and has general operation throughout the State, as to the class of contracts named in it. The private rights of no particular individual are specially varied or affected by it, as contemplated by the 26th Sec., Art. I of the Constitution of 1868. This construction of the Act of 1869 does not invade or impair the obligation of the plaintiff's contract, and thereby render the Act unconstitutional, it only affects his remedy on that contract."

The Court in that ruling did not discuss the effect of Article XI, Sec. 4 and 5, of the Constitution of 1868; nor the effect of Article III, Sec. 6, Par. 3, of said Constitution on the Act of 1869; nor have they done so, in any other ruling to be found in the adjudicated cases.

The ruling cited, is made on a common law action, while the case at bar, is founded on a statute against indemnities of a trust, and comes directly and clearly under Article XI, Sec. 4 and 5, of said constitution. The ruling cited, as shown by this reference, is not a parallel case to the action at bar, and therefore is not an authority in this action. This action is protected by Article XI, of said Constitution.

In *Kimbro* vs. *The Bank of Fulton*; the right of action was founded on the contract of the corporation running

to the holder of the bills, and was discussed and passed on as a common law right of action; and the validity of the bills sustained under the pleadings, although suit was brought in 1871, on the bills of a bank that failed or ceased to do business in 1865. In this ruling, in their reasoning, the Court would seem to imply that said bank bills were barred by said Act, if the fact appeared in the pleadings, that said bills had ceased to be used as currency before June 1st, 1865; but the action of the Court had the contrary effect, by giving judgment for the plaintiffs. The action at bar is not upon a contract between the parties, but this action is on the statute. It is the law that binds the defendant to perform and liquidate his liability, "*Prout Dubuit.*"

Branch vs. *Baker*, 53 Georgia, 511.

We are cited to the case of *Bank of the State of Alabama* vs. *Dalton*, 9 Howard 527. This was a suit to enforce a judgment in Mississippi, that was of more than two years standing in Alabama; and under the laws of Mississippi the right of action on all foreign judgments coming into that State, were barred after two years. We fail to see any application of this authority to the present action.

We are also cited to the case of *Bronson* vs. *Kinzie*, 1 Howard 315: In this case the Court say: "If the laws of the State, passed afterwards, had done nothing more than change the remedy upon contracts of this discription, they would be liable to no constitutional objection. For undoubtedly a State may regulate at pleasure the modes of proceeding in its Courts, in relation to past contracts as well as to future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. * * * * * And although a new remedy may be deemed less convenient than an old one, and may in some degree render the recovery of debts more tardy and difficult, yet it

will not follow that the law is unconstitutional. Whatever belongs merely to the remedy, may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the constitution." ☞ And refers to 8 Wheaton, 1 *Green* vs. *Biddle*. With these authorities cited by the defendant, the plaintiff is content to rest his case; but he has also cited the cases of *Samples* vs. *Bank*, 1 Woods, C. C. R. 528–9., and *Terry* vs. *Tubman*, 92 Otto 156. In Samples' case the circuit Judge held " that he was controlled by the opinion of the Supreme Court of Georgia in their opinion in *Kimbro* vs. *Bank of Fulton*, (heretofore discussed) and places the reason for his ruling on that authority. But the plaintiff submits that said Court, (as we have shown) erred in adopting that ruling as law, or controlling this action. The circuit Judge was not bound by the ruling of the State Court; 18 Wallace 546, *Boyce* vs. *Tabb*. The action against the Bank of Fulton, was for " *a jus in re*," while the present action, is for " *a jus ad rem*." In the former case, it was against a principal upon the promise; In the present action it is against the idemnity; made liable by the statute as a trustee for the performance of a trust. In that case the Court held that if the notes were barred as against the corporation then they were also barred as against the stockholder, but under the statute, in the present action, the stockholder is made ultimately liable for the redemption of the bills, independent of the corporation, and therefore that authority will not apply in this case. But the principle laid down in *Sparks* vs. *Pico*, 1 McAllister 499–500, and *Huges* vs. *Edwards*, 9 Wheaton 497–8, and *Elkins* vs. *Edwards*, 8 Georgia 326, and *Thayer* vs. *Mann*, 19 Pickering 537, would be the rule in this case; and, as

ruled in *Cherry* vs. *Lamar*, it would be quite immaterial if the bills were barred as against the bank, the debt remained a subsisting liability against the stockholder. These liabilities exist for different reasons, they arise under different obligations and are controlled upon different principles. The personal liability clause of the charter, Sec. 9, Prince's Dig. 117, reads as follows: "The persons and property of the stockholders, * * * * shall at all times be pledged and bound in proportion to the number of dollars issued upon each of the shares that each individual or company hold, possess or are interested in, * * * for the payment and discharge of the debts or contracts of said bank, or for the ultimate redemption of all notes or bills issued, or that may hereafter be issued, by or from the said bank, * * * in the same manner as in simple actions of debt or common commercial cases." And part of Section 7 reads, "And if the said corporation shall at any time refuse or neglect to pay, on demand, any bill, note, or obligation, issued by the corporation according to contract, promise, or understanding, therein expressed, the charter hereby granted shall be forfeited." This liability of the defendant is of record in the statute, and is a record of the highest dignity. A mortgage debt is recorded, but of lower dignity.

Squaring this condition of the grant of charter, by the authority laid down in *Sohn* vs. *Watterson*, then plaintiff's right of action extends to the year 1885.

Under this statute, the plaintiff had two rights of action on his bills. One right of action was against the corporation, upon the refusal to pay on demand: that was upon the contract of the bank running to the bearer of the bills. And he had a further right of action against a stockholder, upon proof of the condition broken in the grant. That was upon the statute of charter, which

made the stockholder liable to perform that condition upon due proof of condition broken. That liability of the stockholder, sued for in this action, existed in the second degree as an indemnity. And if the plaintiff had an immediate right of action in the first degree against said defendant, stockholder, as against the maker of the bills. Yet, the plaintiff submits that it was more equitable to pursue his remedy in the second degree, after the assets of the corporation were exhausted, and the benefit of those assets were duly credited upon the defendant's liability, than to have pursued his right of action against the defendant, before the corporation was exhausted, and before the credit was made on the debt of the defendant. There is no provision in the statute requiring bill holders to sue for the debt of the bank, or to sue for the ultimate redemption of the bills. The creditor may elect his remedy by any proper process.

Accepting the literal words of the Act, and the proofs made in the cause, when was the plaintiff's right of action first subject to the statute? The judgments bear date June 23, 1870. The bills were protested July, 1872. Then, if we take the literal words of the Act, those dates must be held, as the dates when the right of action was first subject to the statute, and limitations run from those dates.

93 Otto, 98–'9; *Bird, et al.* vs. *Louisiana State Bank.*
8 Georgia, 476, Par. 6, 2 dly; *Lane* vs. *Morris.*
Heyts' Digest, 809, Sec. 50.
2 Sneed Tenn, 482; *Bank of Memphis* vs. *White.*
7 Johnson's Chancery, N. Y., 90; *Kane* vs. *Bloodgood.*

The law making the bank bills legal, and authorizing their issue, also prescribed their tenor and form and the terms of issue. Those terms were, "will pay the bearer on demand." This *quasi* contract was the *act or terms of the law to make the bill valid.* When the first taker of the

bill delivered it to some other person, then the law directed payment to him. This is the terms prescribed in the Act to make the bill valid. And each new bearer of the bills is to be regarded as having received them of the bank at that date delivery. Upon this state of facts, how is it possible that the plaintiff is within the purview of the act of 1869, if his petition is true. By its statement, it would seem a flat contradiction.

On defendant's brief, pages 2, 3, and 4, he says—

"The only remaining question, and, indeed, the only question that was seriously urged in the Circuit Court, is the constitutionality of the Act of Limitations of March 16, 1869. This point does not appear in *Terry* vs. *Tubman*, and is still to be passed upon by this Court. It has been repeatedly decided by the Federal Courts in Georgia, (see *Samples* vs. *Bank*, 1 Wood's Rep., where it is clearly and well stated). * * * *

"*It is further to be remarked, that this Act only applied to causes of action that had accrued nearly four years before its passage, from June* 1, 1865, *to March* 16, 1869, and the transactions at which it was aimed were either of eight years standing (before the war), or else had arisen during a state of affairs that rendered it peculiarly difficult to arrive at just rules of decision.

"*Most of the cases covered by the Act would have beeu barred before its passage*, but for the supension of the statutes of limitations during the war. In short, it was an *Act demanded by the public good*, and has now for eight years been in full force, upheld by every authority, State and Federal, and, I believe, will not now be overturned by this Court, without stronger reasons than seem to me to exist."

Here, then, we have the key to reasons for the act given by the defendant. It was an act of expediency to protect debtors from their liability to pay their debts. Defendant says it was aimed at debts that had occurred nearly four years before its passage, or eight years standing before the war; (in modest terms it was a legal repudiation of liabilities to pay debts,) and if aimed at debts that was contracted before the war, it was aimed at debts that was incurred at a gold value, and not particularly at confederate transactions made during the war.

It is here clearly admitted to be a class legislation to

affect only those rights of action in existence at its passage; but did not affect, and was not intended to affect, liabilities that accrued after its passage.

It is not seriously contended that said act is a sound constitutional law, but it is pleaded and excused as an expedient measure, as a merciful law, as a specific for the ills of the war.

It is not contended in defendant's argument, neither in any ruling found in the books, that said act is a constitutional and valid act as plead in this cause under Article XI, sections 4 and 5, of the Constitution of 1868. Said act is a parcel and part of the same class of legislation sought to be enforced by Article V, section 17, of the Constitution of 1868, as heretofore declared unconstitutional by the Supreme Court of Georgia, in *Branch* vs. *Baker*, 53 Georgia, 511, and heretofore declared unconstitutional and void by this Court in *White* vs. *Hart*, 13 Wallace, 647.

In *Sample* vs. *Bank*, 1 Woods, 529, the Court cite "2 Black., 599; *Leffingwell* vs. *Warren*, in support of said ruling."

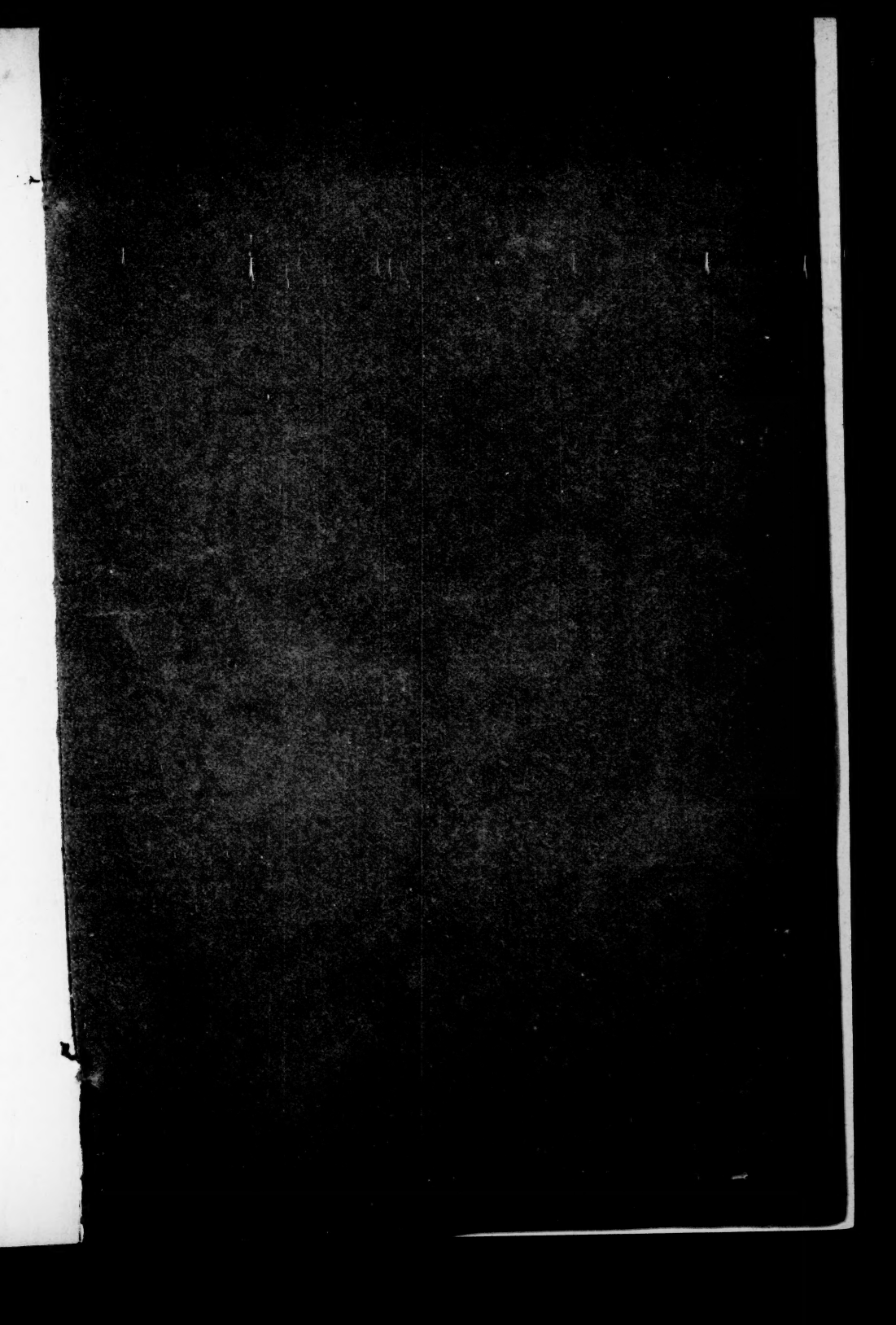
This was an action of ejectment to recover lands held by the defendant under a tax title deed in the State of Wisconsin, and arose from default of the plaintiff to pay his taxes under the laws of the State as it existed at the date of the default of the said plaintiff to pay his said tax; and this suit was to test the limitation laws of that State as they existed and had been construed by the Supreme Court at the time the default of the plaintiff in ejectment occurred. The Supreme Court of the United States very properly sustained the limitation laws of Wisconsin as they existed at the date of the default of the plaintiff. The Court say: "The equities of the plaintiff are very strong. We have felt their force. Without any fault on his part, he has been divested of

his title to his land. But our duty is to apply the law—not to make it."

The plaintiff at bar pleads for the enforcement of his rights of action, under the law as they existed in Georgia at the date of the issue of his bills, and as his rights of action existed at the date said action accrued. In other words, the plaintiff here asks that this Supreme Court will construe the limitation laws of Georgia under the *lex loci* of the transaction, and as they vested in the cause. Not to stretch the law to aid the plaintiff, nor to contract the law to shield the debtor. Not to make the law; but to construe the law as made, at the date the right in action vested. And if the Act of 1869 has intervened to cut short the plaintiff's right of action as plead in this cause, then the authority of this Court is invoked to declare said act unconstitutional and void as a bar to said action. State legislation may conclude or bind a contract, but subsequent legislation cannot set it aside.

16 Howard, 369, 415; *State Bk. of Ohio* vs. *Knoop.*
7 Cranch., 164; *State of New Jersey* vs. *Wilson.*
18 Howard, 331; *Dodge* vs. *Wilson.*
6 Cranch., 135; *Fletcher* vs. *Peck.*
18 Howard, 384,–5; *Mechanics & Trad. Bk.* vs. *Thomas.*
8 Wallace, 438–9; *H. of F.* vs *Rouse.*
6th Ed.; *Angel on Limitations*, § 80, 113, 137, 166.
6 Wheaton, 481; *Prevost* vs. *Gratz.*

HARVEY TERRY.



IN SUPREME COURT

OF THE

UNITED STATES.

No. 266.

HARVEY TERRY et al., Appellants,

and

EDWARD C. ANDERSON, Jr., et al., Appellees.

Argument of H. R. JACKSON

for

NOAH B. KNAPP and others, of the Appellees.

MORNING NEWS STEAM PRINTING HOUSE.

HARVEY TERRY ET AL,
Appellants,
AND
EDWARD C. ANDERSON, JR., ET AL,
Appellees.

In the Supreme Court of the United States. In Equity on demurrer.
No. 266.

ARGUMENT OF H. R. JACKSON,

OF COUNSEL FOR N. B. KNAPP ET AL., *Appellees.*

The Planters' Bank of the State of Georgia was incorporated in 1810–11, to continue until January 1st, 1841; and its charter was renewed for twenty years in 1836, and again in 1859 to continue until January 1st, 1881. By the original charter the capital stock was "to be $1,000,000, to be divided into 10,000 "shares of $100 each;" and provision was made for the payment of the stock subscribed for in instalments to be called in as prescribed in the charter. The statutes by which the charter was from time to time renewed added to it the following clause, which it did not contain before: "the persons and property of "the stockholders for the time being in said Planters' Bank "shall be pledged and bound, in proportion to the amount of "the shares that each individual or company may hold in said "Bank, for the ultimate redemption of the bills or notes issued "by or from said Bank during the time he, she, or they may "hold such stock, in the same manner as in ordinary com- "mercial cases or simple cases of debt." (Prince's Dig., 132.) (Acts 1859. Pam. 20–1.)

It is stated in the bill that at the time of the failure of the Bank, out of which this suit springs, each of the defendants held a number of shares, for which only $80 per share had been paid in, and that there was a balance of $20 on each share held by them unpaid.

It is also stated that at the time of the failure of the Bank that is, on February 20th, 1865, when "it ceased to pay its bills "or notes in lawful money of the United States," there were

outstanding bills and notes issued by said Bank amounting to $1,460,112, of which $207,448 having been subsequently redeemed, there remained unredeemed, at the time of an assignment hereinafter referred to, the amount of $1,155,038. And the object of this suit is to obtain a decree requiring the defendants to pay the alleged unpaid part of their stock subscriptions, and also the amount of their alleged proportionate liability for the bills of the Bank, to be appropriated to the satisfaction of the claims against the Bank set up by the complainants and others who may become parties to the cause.

On the other hand, if the complainants have made out any case at all (which will be a matter for consideration presently), it is this: they say that the Bank failed on February 20th, 1865; that on May 24th, 1866, at a meeting of stockholders, the directors were instructed to assign the assets of the Bank to Anderson and Mercer for the benefit of the creditors, which assignment was duly made on July 9th, 1866, conveying all the Bank's property, assets, and choses in action, of every description, for the purpose stated; that the assignees, by notice published in the newspapers, called upon all creditors to present their claims; that in December, 1869, the complainant Terry accordingly presented bills of the Bank to the amount of $5,605, and the other complainants, the Greens, presented bills to the amount of $5,791, and that the assignees paid them, respectively, a dividend of 20 per centum of the amount of their said bills out of the assets in their hands; that the assignees, after these payments, filed a bill in equity in the Superior Court of the State of Georgia for Chatham County against the creditors of the Bank, about 560 in number, including these complainants, in which they asked instructions from the Court as to the distribution of the assets and other matters with a view to a "winding up of the affairs of the Bank;" that the Court "pro-"ceeded to adjudicate upon the rights of the parties to said "bill," and decreed that there was due to Terry upon his aforesaid bills the sum of $5,605, on which 20 per cent. had been paid, and the further sum of $1,117 on which no payment had been made, and that there was due to the Greens upon bills $5,791, on which 20 per cent. had been paid; that the Court further decreed that the assignees should distribute the remaining assets pro rata, which was done, Terry and the Greens, in common with other creditors, receiving 10⅛ per cent. of their claims in

addition to what had been previously paid them, and their claims being thus reduced to 69⅞ per cent. of their original amounts, with interest from July 14, 1871, the date of the decreed referred to; and that on June 30, 1873, the assignees, having finally accounted for all the assets, and showing that no property remained in their hands for distribution, but without having called in the unpaid stock, were finally discharged by the Court from their trust. The complainant Terry further states that after the interlocutory decree of July 14, 1871, and before the final decree of discharge, he presented to the agent of the assignees, for payment, other bills of the Bank amounting to $1,464, and that payment was refused.

Thus it appears that the complainants claim that the Bank owes Terry $6,161, and the Greens $4,046, to the payment of which the defendants ought to contribute the balances of 20 per centum alleged to be due the Bank for their stock, and the amount of their liability for the bills of the Bank under the provision of the charter above set forth.

1. The most conspicuous objection to both these causes of action is found in our second ground of demurrer to the whole bill; (See Knapp's demurrer, trans. record, m. p. 49) and is based upon the Georgia statute of limitations of March 16, 1869. Acts of 1869. Pam. 133–4.

The third and sixth sections of that act are as follows:

SEC. 3. "All actions on bonds or other instruments under seal, "and all suits for the enforcement of rights accruing to "individuals or corporations under the statutes or acts "of incorporation, or in any way by operation of law, "which accrued prior to 1st of June, 1865, not now barred, "shall be brought by the 1st January, 1870, or the right "of the party plaintiff or claimant, and all right of action "for its enforcement, shall be forever barred."

SEC. 6. "All other actions upon contracts, express or implied, or "upon any debt or liability whatsoever, due the public or a "corporation or a private individual or individuals, which "accrued prior to the 1st June, 1865, and are not now "barred, shall be brought by 1st January, 1870, or both "the right and the right of action to enforce it shall be "forever barred. All limitations hereinbefore expressed "shall apply as well to courts of equity as courts of law,

"and the limitations shall take effect in all cases men-
"tioned in this act, whether the right of action had ac-
"tually accrued prior to the 1st June, 1865, or was then
"only inchoate and imperfect, if the contract or liability
"was then in existence."

A precisely similar application of this statute was made by this Court in Terry vs. Tubman, 2 Otto, p. 156. In that case the action was against a stockholder of the Bank of Augusta, Georgia, upon a liability claimed to arise upon the following provision of the charter of that Bank, viz: "The individual "property of the stockholders in said Bank shall be bound for "the ultimate redemption of the bills issued by said Bank in pro-"portion to the number of shares held by them respectively." The action had been commenced after January 1, 1870. It appeared that the Bank had failed before June 1, 1865. It was held by this Court that "the liability for the ultimate redemp-"tion of the bills arises when the Bank refuses or ceases to "redeem, and is notoriously and continuously insolvent;" and the action was adjudged barred by the statute—the Court following the decision of the State Supreme Court in Kimbro vs. Bank of Fulton, 49 Ga., 419.

In the present case it is alleged in the bill that the Bank failed to pay its bills or notes in lawful money of the United States on February 20, 1865, and continued so to fail and refuse until May 24, 1866, when the stockholders directed an assignment to be made for the benefit of creditors, which was in fact afterwards made, and under which all the assets of the Bank were distributed, but proved insufficient to pay the bills. But the suit was not commenced until April 6, 1874.

If so complete a precedent is worth anything, the claim of the complainants founded on the alleged statutory liability of the defendants to redeem the bills requires no further answer.

The objection made by the demurrer to the claim upon the unpaid subscriptions of the defendants seems equally strong, except for the want of a precedent. It was decided by Mr. Justice Bradley, in the Circuit Court for the Southern District of Georgia, in a similar case—that of Marsh et al. vs. Burroughs et al., that such unpaid subscriptions are debts due to the Bank, and therefore assets for the payment of its debts.

1 Woods, 463.

And this is the theory on which the complainants proceed.

The bill does not state when the defendants acquired their stock; but only that they had it on February 20, 1865, the date of the failure of the Bank. (See transcript of record, m. p. 14.) This failure cannot, by any reasonable hypothesis, be ascribed to any other cause than inability—want of means to meet liabilities. Indeed, it was declared by the stockholders as a reason for directing the assignments to be made, and in the deed of assignment itself, a copy of which was attached to the bill (see trans. of record, m. pp. 30–1), that the Bank was "unable to pay its just and legal debts." And an assignment for the benefit of creditors always signifies insolvency.

The complainants state in their bill that the assignees published in a Savannah newspaper for three months, from July 10, 1866, to October 10, 1866, a notice of the assignment, in which they called on bill-holders and other creditors to present their claims; and that they, the complainants, "*in obedience to said "notice,*" presented their bills in December, 1869. (See trans. of rec., m. pp. 6–7). If, therefore, these unpaid subscriptions were debts due the Bank, then, whenever this liability of defendants commenced, it was certainly complete on the 20th day of February, 1865, the day of the Bank's failure as stated; and a right of action accrued at once, according to the theory of the complainants, to the creditors of the Bank against the Bank itself and against the defendants, its debtors. The complainants do not inform us when they acquired their bills. But whether they owned them on the day when they say the Bank failed, or acquired them afterwards, this right of action was incident to and "attendant upon the legal right vested in the holder of the "bills as such" (see decision of Judge Bradley in Marsh vs. Burroughs, already cited, 1 Woods, 469); and the rights and duties of all parties are to be referred to the date of the failure. And these complainants were fully informed of the insolvency in time to assert their right of action—for they tell us that *in obedience to the notice* of the assignees, which was not published after October 10, 1866, they presented their bills for payment and received a dividend of 20 per cent. from the assets, before January 1, 1870.

The complainants endeavor to evade the operation of the act of 1869 by stating that "they did not know, and had "no means of knowing, during the period which intervened "between the times when they presented their bills to the said

"assignees for liquidation and the first day of January, A. D. "1870, the amount of the assets, or the extent and nature of "the liabilities of said Bank" (see trans. of rec., m. p. 7); and "hoped that the assets would be sufficient to pay them in full." But it was wholly immaterial what the *nature* of the liabilities was, or what was the exact amount either of liabilities or assets. It was enough that the assets would not pay the debts; and their own allegations make it perfectly certain that they knew *that* beyond a peradventure; and that they knew it at least from the time of the publication of the assignees' notice to creditors upon which they say they acted. They also say that "the books of the Bank *have been* inaccessible to them, and "they could not, therefore, from them learn the number or "names of the stockholders." (See trans. rec., m. p. 18.) But they do not state that they ever sought access to the books and were refused. And it is not to be supposed that the assignees, or the corporation itself, would have refused to open the books to the inspection of any *bona fide* creditor who proposed to profit by the assignment. Besides, the law of Georgia, from a time long before the failure of this Bank, has required the President and Cashier of every bank in the State to make and publish, at least once every year, a sworn statement of the affairs of the bank, including a list of the stockholders.

Code, §§. 1466–71.

And if access to the books had ever been denied to the complainants, information on that point might have been easily obtained either from the newspaper containing the published statement or from the proper office of the State government. But no excuses can prevent the operation of this statute. There is no such exception provided for in it; and the rule is that no exceptions to the provisions of statutes of limitation can be recognized unless expressed in the statutes. And this rule has been steadily applied to this act by the Supreme Court of Georgia.

Adams vs. Davis et al., 47 Ga., 339
Moravian Seminary vs. Atwood, 50 Ga., 382.
Macon & A. R. R. Co. vs. Bass, 52 Ga., 13.
Taylor vs. Jacoway, 54 Ga., 500.

It is true that the Supreme Court of the State, in March last, in the case of Cherry et al. vs. Lamar et al., not yet fully reported, decided that the Act of March 16, 1869, was not a bar to

a bill filed in March, 1876, by *judgment creditors* of a bank, whose judgments were rendered in 1872-3-4 upon suits commenced in December, 1869—the object of the bill being, as in this case, to compel holders of stock not fully paid to pay their unpaid subscriptions for the satisfaction of the judgments. But the creditors suing in that case were *judgment creditors* who had exhausted their legal remedies against the Bank, and were then proceeding, not upon their bills, but upon their judgments; and the Court specially referred to that circumstance as a reason for its decision, stating that it was not material on what cause of action the judgments were founded. Here, however, the complainants, by their own showing, are not in that situation—they have no judgments—they have never even sued the Bank—the Bank was not a party defendant even to the bill for instructions filed by the assignees—their claim is founded only upon the fact that they are creditors by reason of the unpaid bills which they hold, and was complete, if it ever existed at all, on February 20, 1865.

For these reasons, it is submitted, the Court below was right in sustaining the second ground of our demurrer to the whole bill.

2. We turn now to the demurrer to the whole bill for want of equity. (See Knapp's demurrer, trans. of rec., m. p. 49.) And referring to the rule of pleading that whatever is essential to the rights of the plaintiff and is necessarily within his knowledge must be alleged positively and with precision, and that even when a fact rests within the knowledge of the defendant, it must be positively averred if it be material and of the foundation of the suit,

1 Dan. Ch. Pr. m., p. 411–12.

Story, Eq. Pl., §§. 255–6–7 et sup,

we ask attention to the fact that the complainants have stated several such material facts "on information and belief" only. It was material to both causes of action to state when the Bank failed; yet this is stated only on "information and belief." (See trans. of rec., m. p. 4.) It was material to the demand for unpaid subscriptions to state that the defendants held stock at the time of the failure, and how much they held, and how much of their stock was unpaid, and that the unpaid part had not afterwards been called in; yet all these are stated only "on in-

"formation and belief." (See tran. of rec., m. pp. 7–8–14.) It was material to the claim upon the statutory liability of the defendants to state the amount of the unredeemed circulation at the time of the failure, and how much was afterwards redeemed; yet even such statements as are made on these subjects, insufficient as they are in other important particulars, are made only "on information or belief." (See trans. of rec., m. p. 13.)

But there are far more serious defects in the bill than these—defects in substance, which seem to us fatal to complainants' case, and to have required a dismissal of their bill upon this general demurrer.

We seek first those which affect their demand upon the alleged statutory liability, and find these:

A.—Turning to the charter of the Bank in which this liability is defined, we find that the persons and property of the stockholders were pledged and bound, in a certain proportion for the ultimate redemption of the bills or notes of the Bank issued "*during the time he, she, or they may hold such stock.*" In other words, the liability was personal entirely, and not appurtenant to stock. It began only when the stockholder became a corporator by acquiring his stock, and ceased when he ceased to own the stock. It did not extend to bills issued *before* he thus became a corporator or to those issued *after* he ceased to be so. The reason and justice of this limitation, corroborating the plain meaning of the words used, are too obvious to need discussion. But, although the complainants have set out that clause of the charter and thus shown the limits of the liability, they have nowhere, either directly or indirectly, stated what amount of bills were issued during the time these defendants were stockholders. They say that the Bank, "from time to time "after its incorporation, (which, be it remembered, was in "1810-11), and prior to May 24, 1866," issued a large amount of bills (see trans. rec., m. p. 4); but since they fix the date of the Bank's failure at February 20, 1865, it may be considered as certain that none were issued after that date. And they also inform us that their own bills were issued before February 20, 1865 (see trans. rec., m. p. 11, 14), and were then outstanding and unpaid. They also state that the defendants owned their stock on February 20, 1865 (see trans. rec., m. p. 14); but they do not offer to state, even conjecturally, when they acquired it. Was it a day, or a month, or a year, or five years before the

failure? Whatever time be assumed, the questions remain—what amount of the bills outstanding on February 20, 1865, was issued before that time? and what amount afterwards? and what amount before or after this liability to redeem was introduced into the charter? and when were the complainants' bills issued? If the defendents were stockholders at all, they became liable for the redemption of those bills only which were issued while they were stockholders. And whatever liability they may be under to other holders of bills, they are under none to these complainants unless their bills were issued after they became owners of stock. The liability of the defendants, as stated in the XIII. paragraph of their bill (see trans. rec., m. p. 13, 14), is in direct contradiction of the terms of the charter to which they refer, and by which alone their claim must be judged.

B.—The charter said further, that this liability of the stockholders was to be "*in proportion to the amount of the shares.*" held by them. And the Supreme Court of Georgia have, in several decisions upon similar bank charters, settled the terms of the proportion by which the amount of the liability is to be ascertained; as the whole number of shares to the number held by any stockholder, so is the whole amount of bills to be redeemed to the amount to be paid by that stockholder. For this it will suffice to refer only to some of the later cases.

Robinson vs. Lane, 19 Ga., 337.
Belcher vs. Wilcox, 40 Ga., 391.
Branch vs. Baker, 53 Ga., 502.
Boyd & Son vs. Hall, 56 Ga., 563.

It was also decided in the case in 53 Ga., that the stockholders' liability is to be measured by the amount of bills unredeemed *at the time the action is commenced;* allowance being necessarily made not only for the amount redeemed out of the assets of the Bank, but also for the amount redeemed by stockholders, before the action was commenced; for the obligation to redeem extends to *all* the bills, and is not limited to those held by any one bill-holder. But these complainants, besides their omission to allege what amount of bills was issued during the time the defendants held their stock, have failed to furnish the terms of the proportion by which the liability of the defendants must be computed. They say that the bills outstanding when the Bank failed were $1,460,112; and that of this

amount $207,448 were redeemed before the assignment was made; leaving a balance, they say, of $1,155,038 outstanding at the time of the assignment—which balance is not correct by their own figures. (See trans. rec., m. p. 18.) But they say, moreover, that *after* the assignment, the assignees paid them 20 per cent. of their bills out of the assets in their hands; and that, still later, under the decree of the Superior Court for Chatham County, before referred to, the assignees paid them enough more to make an entire dividend of $30\frac{1}{8}$ per cent. (See trans. rec., m. p. 10.) They do not say that similar payments were made to other holders of bills, but we may infer that from the statement that the decree required the assets to be distributed *pro rata* among all the creditors of all classes *who were parties to that suit.* But they also inform us that there were 560 creditors, "*holders of bills, depositors, and others,*" who were parties to that suit and participated in the distribution (see trans. rec., m. p. 8); yet, they do not attempt to state, even by attaching a a copy of those proceedings as an exhibit, how many of those creditors were bill-holders, how many were depositors, how many held claims of other kinds; nor how much was due to each class of creditors. And this information is absolutely necessary to enable the Court to determine the third term of the proportion—for the statutory liability of the defendants is to bill-holders only and not to any other creditors; and only on bills unredeemed when the suit was commenced, which were issued while they held stock, and after the provision for this liability to redeem bills was added to the charter, and not for any other bills. So it appears that, even if the complainants' theory of their case be correct, their statements are insufficient to enable a decree to be rendered upon this branch of it.

C.—Again,—the charter said the persons and property of the stockholders should be pledged and bound, etc., "in the "same manner *as in ordinary commercial cases or in simple "cases of debt.*"

It is of little importance to inquire whether the words "as in "ordinary commercial cases or in simple cases of debt" were used in a general or a technical sense—whether they refer to the nature of the stockholders' obligation or to the means by which the bill-holder was to be enabled to enforce it. A careful consideration of the whole clause will, we think, lead the mind of every one to the latter view. The only difference be-

tween them in results is that if the former be accepted as the correct view of the legislative design, we have one step more to take—but that an unavoidable step—to arrive at a rule which is expressly stated if the latter view be correct. For it seems to us that the evident intention of the Legislature was that the nature and extent of the stockholders' obligation and of the bill-holders' rights, should be precisely the same as those of the obligations of debtors and the rights of creditors arising out of those contracts to pay money, either express or implied, which are of most common occurrence among persons engaged in trade or commerce. If the words in question were used in a general sense, what other contracts can they denote than such as arise upon promissory notes, acceptances, indorsements, debts on account? If they were used in a technical sense, the word "*cases*" being read "*causes*," what other remedy can they denote than the ordinary remedy afforded by law for breaches of such contracts? And that remedy is by action at common law in a court of common law. The words "*in the same manner*" are words of limitation—they exclude all other modes of procedure—and give to the bill-holder against the stockholder the same rights and remedies which the creditor has against his debtor upon a promissory note, and no others. A creditor of the class referred to may sue upon his note and obtain a judgment against his debtor; the judgment is a lien upon all the debtor's property, and if imprisonment for debt be allowed, his person may be taken in execution. It was in that "manner," and not otherwise, that the persons and property of the stockholders were to be pledged and bound, etc.

But the creditor cannot sue where, when and how he pleases. His action must be in a court of common law, within the time prescribed by the statute of limitations, according to the rules of pleading and practice prevailing in such cases and in such courts. Are we asked, in reply, whether a bill-holder is excluded from courts of equity absolutely and under all circumstances? Surely not, we answer. There may be special circumstances which will enable the holder of a promissory note to proceed in equity against the maker; and similar circumstances might easily occur to entitle a holder of bills of this Bank to seek his remedy in a court of equity against a stockholder. But no such circumstances appear in this case. The fact that the complainants had other demands of such a nature

that they could only be prosecuted in a court of equity, furnishes no reason for joining with them these, which can only be prosecuted in a court of law. We adopt the language of the Chief Justice in the case of Pollard vs. Bailey. The individual liability of the stockholders in that case, he said, "was not only "to be apportioned and collected, but the mode of apportion- "ment, and the manner of collection were specially provided "for. The liability and the remedy were created by the same "statute. This being so, the remedy provided is exclusive of "all others. A general liability created by statute without a "remedy may be enforced by an appropriate common law action. "But where the provision for the liability is coupled with a "provision for a special remedy, that remedy, and that alone "must be employed."

20 Wall, 520–7.

In that case the statute had provided a remedy *in equity*—in this, the remedy provided was *at law*. But the principle is precisely the same—*so the law is written*. It might have been more convenient to entrust the adjudication of such cases to courts of equity, as the Chief Justice intimated in his remarks on page 525. But just the reverse was done here. It is not a question of convenience, but of positive statute. And we submit that precisely the same reasoning which led to the decision in Pollard vs. Bailey applies to this branch of the present case, and required that the bill should be, to that extent, dismissed. As to this part of the complainants' claim a court of equity could have no jurisdiction, except for special reasons, extraneous to the claim itself; and none such are stated in the bill.

We pass now to the consideration of defects in the substance of that part of the bill which sets forth the claim of the complainants upon the unpaid subscriptions of the defendants. We regard it as established that creditors cannot come into a court with such a claim until they have first reduced to judgment their demand against the Bank and exhausted their legal remedies. But the complainants show in their bill that they have not put themselves in that position. Their allegations make it entirely certain that they have never sued the Bank upon their bills. But, conscious of their weakness on this point, they assume that the decree of the Superior Court for Chatham County, upon the bill filed by the assignees against themselves and other

creditors, which directed a distribution of the assets among those creditors, was equivalent to a judgment against the Bank upon their bills. That is not so, however, upon their own statements. According to the account they give of that suit, the Bank was not a party to it—but only those creditors were parties whom the assignees chose to treat as creditors. (See trans. rec., m. p. 8–9.) The bill filed by the assignees was founded on the assumption by them that the defendants were in fact creditors. The Bank, not being a party, had no opportunity in its corporate capacity to come in and controvert their claims. Nor was such opportunity afforded to the stockholders, who, being interested in the result, would have had a right, under the law of Georgia, if the Bank had been sued and had failed to make any defenses it may have had, to make them on their own account and for their own benefit.

Code, section 3451.

The Court obviously accepted, without investigation, the admission of the assignees that the defendants were creditors, and directed the distribution to be made upon that admission. Doubtless the assignees were conscientious and careful in their conduct; but their admissions could not conclude the stockholders, nor deprive them of their right to controvert any of the claims admitted by the assignees. Nor could it conclude the Bank itself. And it is idle, and contrary to justice and reason, for the complainants to pretend that the decree for distribution was, in any proper sense, an "adjudication" of their demands against the Bank. It is true that the complainants, sensible of their weakness in this particular, state that the Bank surrendered its charter, and that the surrender was accepted by the General Assembly of the State on March 18, 1869. (See trans. rec., m. p. 12.) But that is not true as stated; for, upon a reference to the resolution of the General Assembly, it appears that it merely *authorized* the Governor to accept the surrender.

Acts of 1869. Pam. 201–2.

And there is no allegation that the Governor ever did in fact accept it. Besides, as already urged in another branch of the argument, the complainants were informed of the insolvency of the Bank as early at least as 1866; for they tell us that it was "*in obedience to the notice*" of the assignees, published in that year, that they presented their bills for payment; and they must have held their bills at that time, or the notice would not

"singular the property and estate, goods, chattels, etc., debts, "choses in action, sums of money, and demands due and owing "or belonging to" the Bank, with power to sue for them, etc.,— not those only which were set out in the schedule, but all whatsoever belonging or due and owing to the Bank. So that, if this unpaid stock was assets, the complainants seem correct in their opinion that the assignees were entitled to collect it. If there is any doubt about it, this, for all the complainants tell us, may have been one of those very "questions" upon which they say the assignees prayed the judgment of the Superior Court. But, however that may be, it is very apparent that the assignees would not be entitled to ask for their discharge, or to claim that the affairs of the Bank were "wound up," until they had performed their whole duty under the assignment; and that the Court ought not to have discharged them unless it was satisfied on that point. Since it did discharge them, it is necessary to assume that it was so satisfied. And, if it was so satisfied, that is an end of this branch of the complainants' case. It is *res adjudicata*.

But suppose this class of assets escaped, or was not brought to the attention of the Superior Court, whose fault was it? The case was pending three years at least. The complainants were eager to get all they could for their bills; Terry, in particular, was on the alert; for, bringing forward $1,117 of bills which he had not previously presented to the assignees, he took care that they should be put on the same footing with those before presented by securing a payment of twenty per cent. on them before a final distribution should be made. They were parties to the cause, actively participating in the proceedings, which took at least three years from the filing of the bill, and two from the date of the interlocutory decree. There was nothing to prevent them from asking the Court to require the assignees to collect this class of assets. The charter provided for the payment of subscriptions for stock in instalments, and was notice to them that some of the subscriptions might, perhaps, not be fully paid. What the truth was as to that they could have ascertained at any moment from the books of the Bank. They say "the books have been inaccessible to them;" but it is beyond doubt that the Court, upon their application at any time during the progress of the suit, would have required the books to be thrown open for their inspection, no matter in whose pos-

session they may have been. If the complainants neglected the assertion of a right so obvious and so clear, whom have they to blame but themselves? Must they not abide the consequences of their own laches? Were not the prayers of the assignees' bill, as stated by the complainants themselves, comprehensive enough to cover all conceivable matters connected with the "winding up" of the affairs of the Bank? And is not every other court under a necessity to treat the final decree as *absolutely* final and conclusive upon all the parties to that litigation? If it were an ascertained and conceded fact that this class of assets had, indeed, been overlooked in the Superior Court, either through inadvertence or erroneous opinion, correction was impossible there even by bill of review.

Story Equity Pl., section 404.

Much more impossible is it in any other court. For a review of the supposed error of the Superior Court would have been the necessary result and effect of this part of the complainants' bill if the Circuit Court had entertained it.

4. It remains only to refer to that part of the complainants' bill which sets up Terry's claim upon $1,464 of bills, upon which he received nothing from the assignees either before or under the decree of the Superior Court for Chatham County (see trans. rec., m. p. 11–12), which is demurred to in our second partial demurrer. (See trans. rec., m. p. 51.) Much that we have said of the bill as a whole under our general demurrer, and under that of the limitation act of 1869, applies to this claim, and need not be repeated. And we have but a word to add. *The complainants left blank the time when Terry received these bills; and the blank has never been filled.* (See trans. rec., m. p. 12.) If he had them when he presented his other bills for payment, and during the proceedings upon the assignees' bill, and neglected for any reason to secure their share of the Bank's assets, surely it is superfluous to argue that it would be unjust to require *us* now to repair the consequences of that neglect. If he did not acquire them until after those proceedings had terminated in a final decree, he took them with full knowledge of all those proceedings and that the affairs of the Bank had been finally "wound up." And surely a court of equity will not allow us to be made the victims of what was, if that hypothesis be correct, a mere speculation of very questionable propriety.

For all these reasons we respectfully submit that the judgment of the Circuit Court should be affirmed.

Henry R. Jackson